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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA 2010

IN AND FOR THE COUNTY OF YAVAPAI
JEANNE HICKS, Clerk
BY AB Chamberlain
Deputy

STATE OF ARIZONA,)
) Yavapai Superior
) Court No.
) P1300CR20081339
)
) Plaintiff,)
)
) Jury Trial;
 vs.) afternoon session
)
)
 STEVEN CARROLL DEMOCKER,)
)
)
)
 Defendant.)
)
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Proceedings held before the Honorable Thomas B. Lindberg

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Prescott, Arizona May 28, 2010
1:18 to 4:37 p.m.

Sandra K Markham, CR, RPR, CSR
Certified Reporter
Arizona License No. 50001

ORIGINAL

SANDRA K MARKHAM, CR, RPR
OFFICIAL COURT REPORTER

1 **APPEARANCE OF COUNSEL:**

2 For Plaintiff:
3 JOSEPH BUTNER
4 JEFFREY PAPORE,
Deputy County Attorneys,
Yavapai County Attorney's Office.

5 For Defendant:
6 JOHN M. SEARS,
Attorney at Law.

7 LARRY HAMMOND,
Attorney at Law.

8 ANNE CHAPMAN,
9 Attorney at Law.

13:18:12 1 THE COURT: We are resuming State versus Steven
13:35:50 2 Democker, 20081339. Mr. Democker is present with his
13:35:54 3 three counsel and the two prosecutors are also present.

13:35:56 4 What would be your preference in terms of
13:36:05 5 order of things? Do you want to start going over the
13:36:06 6 preliminary jury instructions first?

13:36:09 7 MR. SEARS: Your Honor, I think we do need to
13:36:11 8 turn to that, but before we do that, I know the Court
13:36:17 9 understands the time pressure that the defense has been
13:36:19 10 under the last 48 hours since this case became a
13:36:22 11 noncapital case and we have been necessarily involved in
13:36:27 12 preparing for the hearings in court and working on the
13:36:30 13 motion that was heard this morning.

13:36:31 14 But not far from the top of our list is our
13:36:35 15 request that you review and modify Mr. Democker's release
13:36:42 16 conditions and this is the start of a three day holiday
13:36:47 17 weekend. His family is here. His daughter graduates from
13:36:51 18 Prescott High School tonight.

13:36:52 19 You had said previously, your Honor, in a
13:36:56 20 hearing in which we had made this motion earlier, that you
13:37:01 21 had not found a change in circumstances that you thought
13:37:06 22 justified a modification under Rule 6.8, but you said
13:37:11 23 hypothetically at the time last year that one of the
13:37:15 24 circumstances that you would consider is whether this case
13:37:19 25 was a death penalty or not. Well, now it's not.

13:37:22 1 And we have the added benefit over time of
13:37:26 2 Mr. Democker's continuing good behavior in custody, all of
13:37:32 3 the things that the Court knows about the evidence and
13:37:34 4 lack of evidence in the case, and the fact that we are now
13:37:39 5 on the eve of a trial that's expected to last a certain
13:37:44 6 number of weeks and that there are unresolved --

13:37:47 7 THE COURT: Or uncertain number of weeks if you
13:37:49 8 pardon my interruption.

13:37:51 9 MR. SEARS: I'm sorry, your Honor?

13:37:52 10 THE COURT: Or an uncertain number of weeks if
13:37:54 11 you will pardon the interruption.

13:37:55 12 MR. SEARS: You know, that is probably much more
13:37:56 13 accurate, your Honor.

13:37:58 14 But the point is I think things have changed
13:38:03 15 in a dramatic way with respect to what this case is about.

13:38:06 16 We had always told you truthfully
13:38:10 17 Mr. Democker had no intention of running away from the
13:38:13 18 capital charges and certainly he has no intention of
13:38:16 19 running away from these charges, particularly with the
13:38:20 20 benefit of all these additional months of seeing what the
13:38:23 21 State's case is and what more it is not against him.

13:38:29 22 His family remains firmly in his corner and
13:38:35 23 are here to demonstrate that. He has now missed Katie's
13:38:39 24 graduation from college and is likely to miss Charlotte's
13:38:44 25 graduation from high school. I think there are more good

13:38:48 1 reasons now than there were when the previous motions were
13:38:51 2 brought, but most significantly there is a material change
13:38:54 3 in circumstances that would mitigate towards a review of
13:38:59 4 his release conditions in this case, and so I urge the
13:39:03 5 Court to reconsider the matter.

13:39:06 6 My proposal would be to release him on a
13:39:09 7 bond of no more than \$250,000 which his family might be
13:39:12 8 able to post with the GPS program that we had previously
13:39:15 9 presented to you in so much detail in place with whatever
13:39:18 10 limitations geographically on top of that and if the Court
13:39:22 11 wants pretrial services screening, monitoring, and regular
13:39:27 12 reporting in person, we have no objection that.

13:39:30 13 I think the plan would be that Mr. Democker
13:39:34 14 for the duration of the trial remain in the Prescott area.

13:39:41 15 THE COURT: Mr. Butner, Mr. Papore.

13:39:42 16 MR. BUTNER: Judge, first of all, I don't know
13:39:47 17 why they didn't make this motion in writing and it could
13:39:49 18 be made in writing and then we would all have the
13:39:52 19 opportunity to adequately and appropriately respond.

13:39:54 20 But secondly, of course, we're opposed. I
13:39:58 21 believe that request is unreasonable. The amount of the
13:40:01 22 bond especially is unreasonably low.

13:40:06 23 Yes, this is no longer a capital murder
13:40:10 24 case, but it's still a first degree murder case and it's a
13:40:13 25 case that involves a brutal murder and we firmly believe

13:40:19 1 that we have the right man and we also firmly believe that
13:40:24 2 the evidence that is now before the Court demonstrates
13:40:27 3 that the proof is evident in this case that we have the
13:40:30 4 right man, and a modification of release conditions at
13:40:35 5 this time I think would be highly inappropriate.

13:40:37 6 We've also still got the same evidence that
13:40:42 7 the defendant was planning to flee at the time of his
13:40:46 8 arrest and the Court has had in its possession and for its
13:40:49 9 review the books he had ordered surreptitiously, so to
13:40:56 10 speak, and evidence of his plans to get out of the country
13:41:00 11 and go to Mexico and the new passport that he had obtained
13:41:05 12 in preparation for that. All those kind of things.

13:41:08 13 So we have got somebody that has clearly
13:41:12 14 demonstrated they are a danger to flee and with the charge
13:41:15 15 of first degree brutal homicide, I think that the release
13:41:19 16 conditions should remain as they are presently set.

13:41:25 17 MR. SEARS: Your Honor, I have explained to you
13:41:26 18 why we have not put this motion in writing. If we put the
13:41:29 19 motion in writing, it would be very brief and would simply
13:41:31 20 say what I have just said, and for the first time in the
13:41:38 21 travel of this case, when we come to look at
13:41:41 22 Mr. Democker's release conditions, we actually have today
13:41:43 23 the victims present and I know that Katie and Charlotte
13:41:47 24 would be happy to tell you how strongly they want their
13:41:51 25 father released pending trial.

13:41:54 1 I don't propose to invade Ms. Kennedy's
13:42:00 2 rights to privacy, but I would think it might be
13:42:02 3 appropriate for the Court to inquire --

13:42:04 4 THE COURT: I think the Court's under an
13:42:06 5 obligation to give them an opportunity to be heard.

13:42:08 6 MR. SEARS: Yes, your Honor.

13:42:10 7 And I would just say in terms of flight
13:42:12 8 evidence, that's evidence that has been before the Court
13:42:14 9 and it was before the Court and the Court found that at
13:42:18 10 the end of the Simpson hearing, that the State had not met
13:42:22 11 proof evident, presumption great, nor was there any reason
13:42:25 12 not to set bond in this case, but I would suggest that the
13:42:28 13 amount of bond and the other conditions are all subject to
13:42:31 14 modification and they could be, in my mind, at this point
13:42:35 15 short of a dismissal of the charges, not much more that
13:42:38 16 could be done to change the landscape here than what has
13:42:42 17 happened in the last 48 hours.

13:42:44 18 THE COURT: Mr. Papore, I noted that --

13:42:47 19 MR. BUTNER: Right.

13:42:48 20 THE COURT: -- you went back to address the issue
13:42:50 21 with Ms. Kennedy. Does she wish to be heard in connection
13:42:52 22 with the release question?

13:42:55 23 MR. BUTNER: I don't think she wishes to address
13:42:57 24 the Court individually, Judge, but she indicated to us
13:43:00 25 that she would be all right with a million dollar bond and

13:43:04 1 GPS monitoring.

13:43:07 2 THE COURT: The daughters have a right to be
13:43:12 3 heard with regard to the issue of release.

13:43:19 4 Katie and Charlotte?

13:43:22 5 MR. SEARS: Katie is here. Charlotte is back
13:43:24 6 getting ready for the graduation. Katie Democker would
13:43:27 7 like to speak.

13:43:27 8 THE COURT: She is of age --

13:43:28 9 MS. DEMOCKER: Thank you, your Honor.

13:43:30 10 THE COURT: -- so I will hear from her.

13:43:30 11 MS. DEMOCKER: Obviously my sister and I both
13:43:32 12 would love to have my father -- sorry -- at home with us
13:43:37 13 and here throughout this and I believe that he would be an
13:43:42 14 extremely valuable presence both in my own life, but
13:43:45 15 particularly in my sister's life. It was hard to not have
13:43:47 16 him at my graduation and if he were able to get out and
13:43:51 17 celebrate this time for my sister and I, we would really
13:43:54 18 appreciate that.

13:43:56 19 I know you are under a number of different
13:44:00 20 legal obligations, but the lower the bond, the better. My
13:44:02 21 family has worked very hard and they are all here and have
13:44:04 22 traveled at great expense and put a lot into this, so the
13:44:08 23 lower the bond, the better and we would just ask that you
13:44:12 24 take into consideration our need to have our father at
13:44:15 25 home with us.

13:44:17 1 Thank you.

13:44:17 2 THE COURT: Thank you.

13:44:18 3 Anything else, Mr. Butner?

13:44:21 4 MR. BUTNER: Nothing further. Thank you.

13:44:23 5 THE COURT: Mr. Sears?

13:44:23 6 MR. SEARS: With respect to the amount of bond, I
13:44:26 7 am grateful for the remarks of Ms. Kennedy that were
13:44:30 8 communicated here.

13:44:31 9 The purpose of bond -- I won't review the
13:44:35 10 law. The Court knows the law and the Court knows our
13:44:38 11 position, but an amount in excess of \$250,000 I believe is
13:44:42 12 more than the family can post. Their financial
13:44:45 13 circumstances have not improved in any significant manner
13:44:48 14 and probably given all the circumstances including the
13:44:53 15 state of economy since we were last in front you, \$250,000
13:44:56 16 would be a stretch. A million dollars would not be
13:44:59 17 makeable. Anything north of \$250,000 is likely not
13:45:02 18 makeable as well.

13:45:03 19 But the GPS monitoring, your Honor,
13:45:05 20 particularly in the manner that we described to you is a
13:45:09 21 remarkably powerful tool, and I think the combination of
13:45:15 22 bond and GPS monitoring and what we know about
13:45:19 23 Mr. Democker would all assure his appearance. This man
13:45:22 24 has no intention of running away. He intends to continue
13:45:25 25 to fight and resist these charges.

13:45:27 1 MR. BUTNER: Judge, one further thing that has
13:45:30 2 been brought to my attention by the victim representative
13:45:33 3 and that is that John Kennedy has not had an opportunity
13:45:37 4 to be heard concerning these release conditions.

13:45:39 5 THE COURT: I recognize that.

13:45:52 6 I have obviously, pursuant to the State's
13:45:56 7 motion, dismissed the death penalty and I think that was a
13:46:01 8 critical difference -- is a critical difference in the
13:46:05 9 circumstances. Nonetheless, it is still correctly viewed
13:46:13 10 a first degree murder case and the alternative penalty, if
13:46:17 11 the jury were to convict the defendant, who is presumed
13:46:20 12 innocent, of the charges that he is facing, the defendant
13:46:24 13 would be facing life without possibility of parole for 25
13:46:28 14 years at least or natural life and I still had a
13:46:35 15 significant amount of evidence with regard to alleged
13:46:39 16 plans to flee versus the fact that he was still at his job
13:46:44 17 when -- and working at it when the police came and
13:46:50 18 arrested him in October, some amount of time afterwards.

13:46:54 19 I recognize that some degree of change has
13:46:56 20 taken place in terms of the State's alleged finding of
13:47:02 21 other evidence that might be indicative of an intention to
13:47:09 22 leave the jurisdiction. I think it's a significant
13:47:13 23 change, but I don't think that I can justify going as far
13:47:18 24 as you are asking, Mr. Sears.

13:47:19 25 So I will reduce the bond down to one

13:47:22 1 million dollars cash or secured appearance bond through a
13:47:25 2 bail bondsman with GPS monitoring as part of that, also.

13:47:32 3 I appreciate everyone's comments in
13:47:35 4 connection with this, but I think that's where I must be
13:47:40 5 on the case given the totality of the circumstances of the
13:47:42 6 case at the present time.

13:47:43 7 MR. SEARS: Then the next matter then, your
13:47:46 8 Honor, in view of that and --

13:47:48 9 THE COURT: I will sign a formal order that does
13:47:51 10 reduce the bond anyway.

13:47:52 11 MR. SEARS: Thank you, your Honor.

13:47:53 12 THE COURT: I am not sure how meaningful that is.

13:47:56 13 MR. SEARS: We will have to see, your Honor. My
13:47:57 14 suspicion is not very, but --

13:48:01 15 THE COURT: Understood.

13:48:01 16 MR. SEARS: -- we have prepared some time ago a
13:48:05 17 visitation motion in view of the Sheriff's office utter
13:48:09 18 refusal to consider making any changes, any accommodations
13:48:15 19 to Mr. Democker's visitation schedule in this case.

13:48:18 20 And we had delayed filing that motion for
13:48:23 21 several reasons, but over the last 48 hours we delayed
13:48:26 22 filing that motion because we thought that the issues
13:48:28 23 regarding the jury selection process and the death penalty
13:48:31 24 demanded our immediate attention, but we will file that
13:48:34 25 motion this afternoon.

13:48:35 1 That motion seeks to have this Court
13:48:37 2 intervene where the Sheriff will not under the
13:48:41 3 Constitution and grant this pretrial, presumed-innocent
13:48:46 4 detainee visitation in a reasonable way, and we will bring
13:48:51 5 that motion down now and file it, your Honor. I would
13:48:54 6 like that motion heard as quickly as possible.

13:48:56 7 I am not sure, frankly, that the State has
13:48:59 8 any stake in this matter as it is a motion directed to the
13:49:03 9 Court asking the Court to rule where the Sheriff declines
13:49:09 10 to do that, and I can -- unless the County Attorney is
13:49:10 11 going to take the unusual position they need to represent
13:49:13 12 the Sheriff on this matter, then I don't think it's a
13:49:16 13 dispute in which their response is necessary.

13:49:19 14 So I would be prepared to even discuss that
13:49:22 15 matter this afternoon.

13:49:24 16 MR. BUTNER: Judge, I am sure you are well aware
13:49:26 17 we do have an assigned Deputy County Attorney that does
13:49:30 18 represent the Sheriff's office on a frequent basis.

13:49:33 19 THE COURT: Mr. Fields has been in court before
13:49:35 20 on this case.

13:49:36 21 MR. BUTNER: Right. So we will get the motion
13:49:40 22 and we will get it to Mr. Fields as quickly as possible
13:49:44 23 and it may well be he will have a response.

13:49:49 24 THE COURT: Well, if it is filed today, provided
13:49:54 25 to the County Attorney's office today, I will want a

13:49:56 1 response by Tuesday and I think that --

13:49:58 2 MR. SEARS: We will do that.

13:49:59 3 THE COURT: -- Tuesday at five for Mr. Fields to
13:50:02 4 respond if he chooses to or if the prosecution portion of
13:50:08 5 the office chooses to.

13:50:09 6 MR. SEARS: May I excuse myself for a moment and
13:50:11 7 have that motion brought down?

13:50:13 8 THE COURT: You may.

13:50:14 9 MR. SEARS: Thank you.

13:50:26 10 THE COURT: Phil, could I -- are you going to
13:50:29 11 burn a copy.

13:50:32 12 THE BAILIFF: For the jail.

13:50:34 13 (Discussion held off the record.)

13:50:47 14 THE COURT: While we're waiting for Mr. Sears to
13:50:49 15 return, were there other items that you think we need to
13:50:51 16 take up, Mr. Butner, apart from the urgencies of getting
13:50:55 17 the preliminary jury instructions?

13:50:57 18 MR. BUTNER: I don't think so at this time,
13:50:59 19 Judge, at least from the point of view from the State. We
13:51:02 20 do have that 15.6 affidavit and request concerning the
13:51:06 21 escape bag evidence, so to speak. That's the State's
13:51:12 22 motion.

13:51:12 23 THE COURT: And that's what I was alluding to
13:51:14 24 when I was talking about some other reported evidence with
13:51:20 25 regard to flight allegations.

13:51:21 1 MR. BUTNER: Right. We're prepared to discuss
13:51:24 2 that if need be.

13:51:26 3 THE COURT: Okay. Are you all prepared to
13:51:28 4 discuss that from the defense's stand --

13:51:31 5 MS. CHAPMAN: There are two pieces of that motion
13:51:33 6 and there is one piece of that motion that I think
13:51:35 7 Mr. Sears needs to speak to.

13:51:37 8 We would be prepared to address the computer
13:51:39 9 search issues that have been alluded to several times, if
13:51:43 10 you're prepared to discuss that.

13:51:45 11 MR. BUTNER: That's fine, Judge.

13:51:47 12 THE COURT: Let's move on to that, then. Not
13:51:50 13 waste time waiting for Mr. Sears to get back.

13:51:52 14 MS. CHAPMAN: Sure.

13:51:54 15 Your Honor, you will recall that you had
13:51:56 16 precluded the State from offering evidence of computer
13:51:58 17 searches for which they could not identify the date those
13:52:00 18 searches were performed that arose out of the initial
13:52:04 19 interview with Detective Page on April 27.

13:52:07 20 I had the opportunity to reinterview
13:52:09 21 Detective Page on May 25th, and at that time he has
13:52:13 22 identified two searches, the ones that have been
13:52:17 23 identified before. Again, he is not able at this time or
13:52:20 24 at any time, as far as we could tell, to identify when
13:52:23 25 these searches were performed.

13:52:25 1 These two searches that we had talked about
13:52:28 2 last time, they relate to suicide, and the State
13:52:33 3 apparently wants to offer them based on a date that
13:52:36 4 Mr. Page now says he could determine they were last
13:52:39 5 viewed.

13:52:41 6 So he can't say that any search for these
13:52:43 7 terms was done on a particular date. He can't say how
13:52:46 8 these pages appeared. He can't say, for one of them, what
13:52:50 9 the search page results looked like. For the search page
13:52:53 10 results that he did find, they relate to things like a
13:52:56 11 suicide bombing in Tel Aviv and the Tamil Tigers.

13:53:01 12 Your Honor, he can't say how long anyone
13:53:03 13 looked at this page or again why this page was brought to
13:53:06 14 the computer. He can't say that a search was done. He
13:53:09 15 can't say that this was the first time it was looked at or
13:53:11 16 the last time it was looked at. Only that it was viewed
13:53:13 17 on this particular date, and I think that within --

13:53:17 18 THE COURT: What's the date that he suggests?

13:53:20 19 MS. CHAPMAN: That is June 1st, your Honor.

13:53:22 20 THE COURT: '08 I presume?

13:53:24 21 MS. CHAPMAN: Yes. '08.

13:53:25 22 So, I think your earlier order covers this,
13:53:27 23 because it's not a date that the search was performed, but
13:53:29 24 I wanted to speak directly to that.

13:53:30 25 And then there is another partial webpage,

13:53:33 1 and I want to speak to that, but maybe we should take
13:53:35 2 these one at a time.

13:53:36 3 THE COURT: Mr. Butner, are you prepared on this?

13:53:38 4 MR. BUTNER: I am, Judge.

13:53:40 5 The searches are How to Kill and Make It
13:53:42 6 Look Like Suicide and How to Stage a Suicide, and
13:53:48 7 Detective Page -- the search terms are contained within
13:53:52 8 the entries that are found in the index dot bat file of
13:53:59 9 the computer, but the partial date of the search cannot be
13:54:04 10 determined from that information.

13:54:06 11 What can be determined from that information
13:54:08 12 is the date that that was last viewed, and that date was
13:54:13 13 June 1st of 2008.

13:54:14 14 In terms -- it could be the same day that
13:54:17 15 the search was accomplished, but that is not information
13:54:19 16 that is in the encoded kind of data that is kept within
13:54:24 17 the computer in this index dot bat file.

13:54:27 18 And so in terms of being definite about a
13:54:30 19 specific date concerning those searches, Detective Page
13:54:33 20 cannot be the computer expert, because the DPS crime lab,
13:54:37 21 the one that was interviewed in connection with this
13:54:38 22 specific matter, says exactly the same thing, basically.
13:54:42 23 That information tells you the date that that search term
13:54:47 24 and information was last viewed. It does not tell you the
13:54:50 25 date that the search occurred, and that last viewing date

13:54:53 1 in each of those instances is June 1st of 2008.

13:54:56 2 And I would ask that the Court allow

13:55:01 3 Detective Page to testify to that very narrow specific

13:55:04 4 piece of information about those two narrow specific

13:55:08 5 searches.

13:55:10 6 THE COURT: You would agree under the current

13:55:11 7 order that that would be disallowed because you can't

13:55:16 8 identify that was the search date.

13:55:18 9 MR. BUTNER: Exactly.

13:55:19 10 THE COURT: Based on how the order was phrased.

13:55:21 11 MR. BUTNER: Exactly, Judge.

13:55:23 12 THE COURT: All right. Ms. Chapman.

13:55:25 13 MS. CHAPMAN: Your Honor, the other issue of

13:55:27 14 concern for us is that Detective Page has said multiple

13:55:30 15 things about what these dates mean and don't mean, and I

13:55:33 16 don't think there can be any dispute about that -- about

13:55:36 17 his position about what they mean and don't mean and,

13:55:38 18 frankly, it's unclear to me whether he really knows what

13:55:40 19 these dates mean.

13:55:41 20 It's clear what he doesn't know about them,

13:55:44 21 and given what he doesn't know about them and given the

13:55:46 22 way that the search terms are phrased and what results

13:55:49 23 they reveal, I think their probative value is extremely

13:55:52 24 limited and the prejudicial potential is incredibly high.

13:55:56 25 We don't know again whether a search was

13:55:59 1 performed on this day or any day. We don't know how long
13:56:02 2 this page was viewed. We don't know why this page came on
13:56:05 3 the computer. We do know that the search results have
13:56:07 4 absolutely nothing to do with the way in which Carol
13:56:10 5 Kennedy was killed. Again, they have to do with political
13:56:14 6 suicide bombings in other countries.

13:56:17 7 So the prejudicial effect of offering these
13:56:22 8 evidence items --

13:56:23 9 THE COURT: That's in terms of what was found in
13:56:26 10 response to the search query?

13:56:28 11 MS. CHAPMAN: Well, we don't know -- we don't
13:56:30 12 know, frankly, that a search query was done or when it was
13:56:32 13 done. This is what was pulled up. The top of the page
13:56:35 14 doesn't say what it's a result of. It just contains the
13:56:38 15 phrase Suicide Bombing.

13:56:42 16 MR. BUTNER: No.

13:56:43 17 MS. CHAPMAN: So I think -- I can't remember.
13:56:45 18 Let me look here to be certain about what it says.

13:56:47 19 THE COURT: Let's give you a little more
13:56:49 20 certainty, factually.

13:56:51 21 MR. BUTNER: I will wait.

13:56:52 22 MS. CHAPMAN: How to Stage a Suicide By Hanging,
13:56:54 23 and so the phrase that is pulled up is How to Stage a
13:56:56 24 Suicide, but the page itself has two entries. One about
13:56:59 25 the Tamil Tigers staging a suicide in Sri Lanka, and the

13:57:02 1 other one is about a suicide bombing in Tel Aviv, and then
13:57:05 2 the third one is How to Stage a Suicide By Hanging.

13:57:08 3 So these are the results that appear. We
13:57:10 4 don't know -- there's no search phrase at the top of this
13:57:12 5 partial webpage. So we don't have any idea what the
13:57:16 6 search phrase was or when it was performed.

13:57:18 7 We do know it has nothing to do with the
13:57:21 8 facts that are alleged here and so for that reason, the
13:57:25 9 probative value of the fact that we don't know when these
13:57:27 10 searches occurred, and we certainly know what the results
13:57:30 11 are and that they don't relate and what the prejudicial
13:57:33 12 effect is, given your prior ruling, I think these searches
13:57:36 13 should be precluded.

13:57:38 14 THE COURT: Other clarifications, Mr. Butner.

13:57:40 15 MR. BUTNER: Right, Judge.

13:57:41 16 The search phrase is in the research that
13:57:44 17 was discovered by Detective Page. The search phrase is,
13:57:47 18 in one instance, How to Kill And Make It Look Like Suicide
13:57:50 19 and then the other instance is How to Stage a Suicide.
13:57:53 20 Those are the search phrases, and then this computer
13:57:58 21 language stuff down below that, which is extracted from
13:58:02 22 this index dot bat file is what provides the date last
13:58:07 23 viewed of those specific bits of information, so to speak.

13:58:14 24 THE COURT: All right. Thank you.

13:58:15 25 Back to you, Ms. Chapman.

13:58:17 1 MS. CHAPMAN: Your Honor, I can provide the
13:58:18 2 partial webpage results if your Honor would like, but
13:58:21 3 it's -- the question about what the date is and what it
13:58:24 4 means, it is true, it comes from the index dot bat file.
13:58:27 5 Detective Page has said multiple things about what he can
13:58:29 6 and cannot tell from those index dot bat files, but the
13:58:32 7 bottom line is he can't tell when the search was done.
13:58:34 8 He can't tell how long anyone was at the
13:58:37 9 websites -- or excuse me -- at the search result page. He
13:58:40 10 can't tell whether anyone clicked on any of the links that
13:58:42 11 came from the search result page, and he only has one
13:58:45 12 partial search result page from these two searches.
13:58:48 13 The partial search result phrase How to
13:58:51 14 Stage a Suicide is in the one document that they have
13:58:54 15 that's a partial page of results that has the items that I
13:58:58 16 mentioned to you earlier about the Tel Aviv bombing and
13:59:01 17 the Sri Lanka bombing, but that's it. That is what they
13:59:04 18 have. That's what the evidence will be if you permit them
13:59:07 19 to offer it.
13:59:08 20 Again, the probative value of a search that
13:59:11 21 calls up the results about suicide bombings in other
13:59:13 22 countries, that has nothing to do with the way Carol
13:59:16 23 Kennedy was killed, and we don't know when that search was
13:59:20 24 performed, I think the probative value is incredibly
13:59:23 25 limited.

13:59:24 1 THE COURT: But this is -- this is a different
13:59:28 2 date and different evidence and there is other evidence
13:59:31 3 that indicates that -- I'm hesitant to use the word
13:59:36 4 similar, but searches of a similar nature were conducted?

13:59:42 5 MS. CHAPMAN: No, your Honor.

13:59:43 6 Detective Page has no information about when
13:59:45 7 any of these searches were conducted. That's his
13:59:47 8 conclusion. That's the conclusion of his sort of
13:59:52 9 supervisor Detective Lindvay.

13:59:54 10 There are no available information about the
13:59:57 11 dates when any of these searches were performed after two
13:59:59 12 years of full-time investigation about these computer
14:00:03 13 searches and I don't think that at this point Mr. Butner
14:00:07 14 can be made to dispute that. He was at these interviews
14:00:09 15 and there is not information about when these searches
14:00:12 16 were performed.

14:00:12 17 THE COURT: Okay. So I have these on June 1st
14:00:16 18 last viewed. Is there something else that --

14:00:19 19 MR. BUTNER: It sounds like we're splitting hairs
14:00:21 20 here, but it's use of language, Judge, and -- I mean there
14:00:27 21 is information about one of these searches, that it was
14:00:30 22 done after April of 2008 because in the remnant of a
14:00:34 23 webpage is the date of April of 2008, but that isn't
14:00:38 24 the -- one of the two searches that we are talking about
14:00:40 25 now. Okay.

14:00:41 1 Clearly, though, the search was done either
14:00:45 2 on or before June 1st of 2008, and it was last viewed on
14:00:51 3 June 1st of 2008. That's what's clear and the search term
14:00:56 4 that gave rise to this last viewing was in one instance
14:01:00 5 How to Stage a Suicide and then in the other instance How
14:01:04 6 to Kill and Make It Look Like Suicide.

14:01:06 7 There's a remnant of a webpage that counsel
14:01:09 8 is talking about, and it has those hashed sites that came
14:01:16 9 up, but that's a partial webpage. I mean we don't know
14:01:19 10 exactly everything, of course, that --

14:01:22 11 THE COURT: Talking about Tel Aviv, for example?

14:01:24 12 MR. BUTNER: Right. Yes. And the hanging thing
14:01:25 13 and I forget the other thing.

14:01:27 14 But the point is that the search term has
14:01:30 15 remained consistent and it's remained consistent
14:01:32 16 throughout all of Detective Page's interviews, and he has
14:01:37 17 remained consistent about those last viewing dates, too.
14:01:40 18 But he also thought that it was the date of the search,
14:01:45 19 and that is not something that he can say with certainty.
14:01:49 20 It could have been, but he cannot say that with certainty.

14:01:52 21 The only thing he can say with certainty is
14:01:54 22 that each of these two search terms, when they are
14:01:57 23 checked, they were last viewed on June 1st of 2008. He
14:02:01 24 even has the precise times that are extracted from this
14:02:04 25 index dot bat file.

14:02:07 1 THE COURT: In terms of other evidence that the
14:02:09 2 State is seeking to admit concerning computer searches,
14:02:15 3 are there other examples of such?

14:02:19 4 MR. BUTNER: Oh, yeah.

14:02:21 5 THE COURT? -- that you think --

14:02:22 6 MR. BUTNER: Judge, you have already, as I
14:02:24 7 understand it, precluded those things because we were not
14:02:28 8 able to offer dates for those searches. Things like How
14:02:31 9 to Kill -- How to Collect on Life Insurance in the Case of
14:02:36 10 Homicide and Tips From a Hit Man on How to Kill Someone.
14:02:42 11 Those are all searches that were conducted at some point
14:02:44 12 in time, but there are not dates that can be associated
14:02:50 13 with those searches that can be extracted from the
14:02:54 14 defendant's computer.

14:02:55 15 THE COURT: So you're seeking modification of my
14:02:57 16 current order that would allow the June 1st, but not
14:03:01 17 others searches?

14:03:02 18 MR. BUTNER: That's correct.

14:03:02 19 Just these two narrow searches How to Kill
14:03:05 20 and Make It Look Like Suicide and How to Stage a Suicide,
14:03:08 21 and we are asking for one other thing and that would be a
14:03:13 22 webpage remnant that refers to the search phrase How to
14:03:19 23 Stage a Suicide and that has a specific date, also, of
14:03:24 24 June 1st of 2008.

14:03:26 25 THE COURT: And no other computer information

14:03:29 1 then would be provided in the nature of prior searches for
14:03:33 2 these terms?

14:03:34 3 MR. BUTNER: Exactly.

14:03:36 4 MS. CHAPMAN: Your Honor, if I might.

14:03:36 5 THE COURT: Ms. Chapman.

14:03:37 6 MS. CHAPMAN: Just to complete the -- well, two
14:03:40 7 things. On this partial remnant of a webpage How to Stage
14:03:44 8 a Suicide, there is a date on the page. It's February
14:03:47 9 5th -- or excuse me -- 25th, 2005. That is the only date
14:03:50 10 on this page. So all the State can say about this search
14:03:53 11 results page is that sometime between February 25th, 2005
14:03:57 12 and June 1st of 2008, this search was performed.

14:04:02 13 THE COURT: When you say this search, which one
14:04:03 14 are you referring to?

14:04:04 15 MS. CHAPMAN: How to stage a suicide.

14:04:06 16 THE COURT: Okay.

14:04:08 17 MS. CHAPMAN: I think that your prior order was
14:04:10 18 consistent in balancing the 403 factors in terms of what's
14:04:14 19 the probative value of a search that we can't tell when it
14:04:17 20 was performed.

14:04:18 21 The fact that a page was viewed on a
14:04:20 22 particular date does not mean that a search was performed
14:04:23 23 on that date. The State can't tell why the page was
14:04:27 24 viewed or how it was viewed. They can't say that a search
14:04:30 25 was performed on that date. All they can say is that that

14:04:33 1 page was viewed on that computer on that date.

14:04:35 2 And the probative value of that information,
14:04:39 3 particularly when the State has said -- where the State's
14:04:41 4 expert has said multiple things about what that date
14:04:45 5 means, about what the date last viewed means, he cannot
14:04:48 6 describe what that means consistently between interviews
14:04:51 7 or in any of his reports.

14:04:52 8 And I think that the prejudicial value of --
14:04:56 9 particularly when you look at what are these search
14:04:59 10 results, what do those search results reveal, when we look
14:05:01 11 at if the search was performed, what does the partial
14:05:04 12 webpage with these results talk about? And the fact that
14:05:08 13 it talks about political events in other countries makes
14:05:11 14 the probative value of this extremely limited while the
14:05:14 15 prejudicial effect of it, because of what the State wants
14:05:17 16 to argue, is incredibly high to Mr. Democker.

14:05:20 17 So we ask you to reaffirm your ruling with
14:05:23 18 respect to those searches.

14:05:24 19 I do -- the partial webpage that Mr. Butner
14:05:28 20 is talking about is different and it is a webpage that is
14:05:35 21 a photograph of a diagram that apparently comes out of a
14:05:39 22 book.

14:05:41 23 I think that Mr. Butner misspoke when he
14:05:43 24 talked about the fact that this is related to a search
14:05:46 25 term, because both Detective Page and Detective Lindvay

14:05:49 1 said this could not be related to any search. They don't
14:05:53 2 know that it was related to any search at all. All they
14:05:55 3 can say is it was viewed on a particular date.

14:05:58 4 The most important thing about this, your
14:06:00 5 Honor -- again, it doesn't relate in any way to the way
14:06:03 6 Carol Kennedy was killed. It has a victim who was the
14:06:05 7 subject of a gunshot wound and it is a picture of that.
14:06:08 8 It's got -- you know, it's a computer generated picture,
14:06:11 9 but it's got a picture of blood in the room and it's only
14:06:15 10 part of what was revealed.

14:06:16 11 The State can't say what else was on this
14:06:18 12 page. Apparently what they can say is that there was more
14:06:21 13 information on this page that was viewed, but they don't
14:06:24 14 know what it is. They can't recover it.

14:06:25 15 So we think given the probative value of
14:06:29 16 that, given the fact that it has this victim who is killed
14:06:32 17 in some totally other way, given the fact that we have no
14:06:34 18 idea, and the State I think won't dispute this. They have
14:06:37 19 no idea how someone arrived at this page. They can't
14:06:40 20 relate it to any search, and they do know that there was
14:06:43 21 other information on this page that they can never recover
14:06:46 22 and that we don't know what else was on this page at the
14:06:49 23 time it was allegedly viewed.

14:06:50 24 So we are asking you to preclude the
14:06:52 25 searches based on your earlier order and based on this 403

14:06:55 1 balancing and to preclude this page -- this partial
14:06:58 2 webpage diagram that came up again on a 403 balancing and
14:07:04 3 based on the fact that it is incomplete, and we don't know
14:07:06 4 what else was on this page at the time it was viewed or
14:07:08 5 how and why it was viewed on this last visit date.

14:07:13 6 MR. BUTNER: Judge --

14:07:13 7 THE COURT: This purports to be like a shooting
14:07:16 8 scene diagram?

14:07:17 9 MS. CHAPMAN: Yeah. It's a figure. It says
14:07:19 10 Staged Crime Scene and it has a person with a rifle
14:07:23 11 between their legs and blood in the room laying down and
14:07:27 12 it's a diagram out of a book. It's called -- the title of
14:07:31 13 the page -- and, again, we only have part of the page, so
14:07:33 14 I don't know what else was here. No one does. Apparently
14:07:37 15 it says -- it says Equivocal Death Investigation. So
14:07:39 16 that's another piece and it's a photograph from a medical
14:07:42 17 legal art --

14:07:44 18 MR. BUTNER: If we could approach, Judge, so we
14:07:46 19 can show you this and the title I think is right on the
14:07:48 20 page.

14:07:50 21 MS. CHAPMAN: The equivocal.

14:07:53 22 MR. BUTNER: Right down at the bottom. Staged
14:07:55 23 crime scene.

14:07:56 24 MS. CHAPMAN: That is not the title of the page.
14:07:58 25 That's the title of the picture.

14:07:59 1 MR. BUTNER: That is what I am talking about, and
14:08:05 2 that was last viewed June 1st, 2008.

14:08:09 3 THE COURT: For the record, Bates 023486.

14:08:16 4 MS. CHAPMAN: Again, your Honor, apparently there
14:08:18 5 was other information, potentially pictures, text on that
14:08:20 6 page at the time it was viewed.

14:08:24 7 THE COURT: Do you want to address that diagram
14:08:27 8 separately, Mr. Butner?

14:08:29 9 MR. BUTNER: Yes, Judge. I think that it's
14:08:33 10 important that the State be allowed to offer that in its
14:08:38 11 case and there is evidence in this case that this was a
14:08:42 12 staged crime scene and that is evidence that the defendant
14:08:46 13 was researching how to -- in this instance How to Stage a
14:08:50 14 Suicide and that is what that picture is actually is how
14:08:52 15 to stage a suicide.

14:08:55 16 THE COURT: What are the limits of what the
14:08:57 17 experts can testify about when that was viewed?

14:09:00 18 MR. BUTNER: Just the one date. June 1st of
14:09:04 19 2008. That's basically what they could say. The same as
14:09:07 20 the two searches that I was just describing before.

14:09:14 21 THE COURT: Ms. Chapman.

14:09:15 22 MS. CHAPMAN: Your Honor, again, what the State
14:09:17 23 can't say is why this page was viewed, how long it was
14:09:21 24 viewed, what else was on the page when it was viewed.

14:09:23 25 And I think another important

14:09:25 1 consideration -- and I think we made your Honor aware of
14:09:28 2 this in the motion last time -- these searches, if they
14:09:31 3 were, in fact, viewed on this date and again there has
14:09:34 4 been equivocal information about that from Detective Page,
14:09:38 5 were surrounded by web activity on a page called Writing
14:09:42 6 World Dot Com about writing mystery novels.

14:09:46 7 And so, again, I think that with respect to
14:09:49 8 the probative value of this information, when you consider
14:09:52 9 the context, when you consider that we only have a partial
14:09:55 10 result, when you consider that we can't say that this was
14:09:58 11 done as a result of a search, we can't say that a search
14:10:00 12 was done for any particular term on a specific date and
14:10:04 13 that the State is apparently -- and I am not aware of any
14:10:06 14 expert they have about a crime scene staging. In fact, I
14:10:10 15 am aware that all of those experts have been precluded or
14:10:12 16 dismissed by the State and no detectives will be permitted
14:10:16 17 to testify about that given your earlier orders, that
14:10:19 18 there's no reason for this information to come in and that
14:10:22 19 the prejudicial potential for Mr. Democker is high in a
14:10:26 20 way that should lead you under 403 to preclude these two
14:10:31 21 searches and this one partial webpage from being
14:10:33 22 introduced by the State.

14:10:36 23 THE COURT: All right. Thank you.

14:10:37 24 Well, I think that the fact of what is found
14:10:42 25 is not in and of itself probative. What is -- what the

14:10:48 1 evidence is being asked to be admitted for is to show the
14:10:52 2 mental state of the person whose computer it is, alleging
14:10:57 3 that it's Mr. Democker that is doing the searches.

14:11:01 4 So the fact that a search is being done to
14:11:07 5 reflect a person's mental state of doing some
14:11:11 6 investigation into, either from the defendant's
14:11:16 7 perspective, research for a mystery novel or from the
14:11:19 8 State's perspective, of planning a killing of his wife
14:11:22 9 doesn't -- doesn't carry its meaning in what is found so
14:11:29 10 much as it does when it is being searched for and to that
14:11:33 11 extent, as I think my previous rulings indicate, I find
14:11:37 12 that the evidence is probative.

14:11:40 13 The question of whether it's unfairly
14:11:43 14 prejudicial, given all of the rest of the circumstances
14:11:48 15 and the level of foundation that's necessary, those are
14:11:52 16 additional questions presented to the Court and I think
14:11:54 17 that -- as long as a time parameter can be placed on it
14:12:01 18 with regard to when it was last viewed, I think that is
14:12:04 19 sufficient as long as it's within a reasonably relevant
14:12:10 20 time period.

14:12:11 21 I think to the extent that the detective, or
14:12:15 22 detectives plural, may testify as to the contents of what
14:12:21 23 they found in the vicinity of June 1st having been viewed,
14:12:27 24 items having been viewed, with particular terms that are
14:12:38 25 indicative of killing and staging, I think that the timing

14:12:47 1 within a couple of months of the homicide of viewing the
14:12:53 2 materials is sufficiently definite to establish a
14:12:56 3 foundation for generally entering the matter into
14:13:01 4 evidence. And then the weight to be given by the jury
14:13:08 5 with the various explanations that have been prominent
14:13:11 6 throughout the course of the presentation being made
14:13:14 7 today, that there is evidence that Mr. Democker even much
14:13:20 8 before 2008 was doing research for writing a great
14:13:26 9 American novel, in particular a mystery and having to do
14:13:33 10 with death or somebody dying.

14:13:40 11 So I think that the weight then goes to the
14:13:43 12 jury, but I think in terms of general gate keeping
14:13:47 13 requirements on the part of a trial judge, I think there's
14:13:52 14 sufficient probative value so long as there can be this
14:13:55 15 foundation laid as to viewing date, not just the search
14:14:00 16 date, and so I'll amend my previous orders so long as
14:14:04 17 there is a viewing date or search date that's within the
14:14:11 18 two months prior to the death of Ms. Kennedy. And I don't
14:14:20 19 find that the danger of unfair prejudice is substantially
14:14:25 20 greater than its probative value.

14:14:28 21 Nonetheless, I see some real issues for the
14:14:34 22 fact finder about the weight to be given to this type of
14:14:37 23 evidence, but I don't feel as though it's incumbent on the
14:14:44 24 Court to preclude it.

14:14:45 25 MS. CHAPMAN: Your Honor, I understand that is

14:14:46 1 the ruling with respect to the searches.

14:14:47 2 What about with respect to this page for
14:14:49 3 which we only have a part of the picture and we don't know
14:14:52 4 how we got there? This being Bates Number 23486.

14:14:58 5 THE COURT: If the witnesses can establish that
14:15:01 6 was viewed on or about the first as the other ones have
14:15:07 7 been, as counsel have alluded to, as having been viewed on
14:15:11 8 that date, I think it comes in. If they can't establish
14:15:14 9 even that much of it, that it was viewed on that date or
14:15:20 10 when it was searched for, then I don't think it does come
14:15:23 11 in.

14:15:24 12 MS. CHAPMAN: Your Honor, I think the issue with
14:15:25 13 respect to this isn't so much that it was viewed, but we
14:15:28 14 don't know what was viewed because it's not all here.
14:15:31 15 This wasn't a search. It's a page.

14:15:34 16 THE COURT: It's the result of something that was
14:15:37 17 viewed.

14:15:37 18 MS. CHAPMAN: Yeah. They don't connect it to a
14:15:39 19 search result, but the concern here is that there is
14:15:43 20 more -- I mean there was more on this page. We don't know
14:15:46 21 what it was, and there is no way to determine that, but --
14:15:48 22 so we don't know what was viewed. We don't know, if
14:15:50 23 anything was searched, what that was. All we know is that
14:15:53 24 this page was viewed with some other stuff on it and we
14:15:57 25 don't have any way to determine what that other stuff is.

14:16:00 1 So given that it is not search, we don't
14:16:02 2 know what was searched or how it was viewed, and that it's
14:16:04 3 only part of the picture, meaning whatever this is, it's
14:16:08 4 not the whole thing that was viewed on that date. I think
14:16:12 5 that makes it different than the searches where we know
14:16:15 6 that the search phrase was entered and that was viewed.
14:16:17 7 We only know that this, along with other information, was
14:16:20 8 viewed, but we don't know what that other information is.
14:16:23 9 We have no way to determine that according to the State's
14:16:26 10 experts.

14:16:29 11 THE COURT: Well, I still think it comes in with
14:16:31 12 that explanation or that attack as the case may be.

14:16:37 13 Any other issues with regard to that?

14:16:43 14 MR. BUTNER: Nothing further from the State on
14:16:45 15 that issue, Judge.

14:16:46 16 THE COURT: You had some other issues that you
14:16:52 17 wanted to take up other than preliminary jury
14:16:55 18 instructions?

14:16:59 19 MR. SEARS: There is that 15.6 motion that the
14:17:01 20 State has filed that has to be resolved.

14:17:05 21 MR. BUTNER: Right. Yes, we could take that up,
14:17:09 22 Judge.

14:17:09 23 THE COURT: Let's go there.

14:17:10 24 MR. BUTNER: Judge, it's basically our motion
14:17:26 25 requesting leave under Rule 15.6(d) to use primarily

14:17:32 1 the -- what we have referred to, I guess, as the getaway
14:17:37 2 bag that was discovered down by the creek at the
14:17:41 3 Hassayampa Golf Club. This came out -- I'm just looking,
14:17:46 4 and I can't remember the date of that interview. It was
14:17:49 5 very late on -- okay. We did the interview just before --
14:18:07 6 well, I think we did the interview on April the 9th of
14:18:10 7 2010, and then went out -- on Renee Girard and then went
14:18:16 8 out to the scene where this bag was located.

14:18:20 9 And in the bag, which had the defendant's
14:18:25 10 name on the outside as well as his phone number. It's
14:18:29 11 actually wrapped in black plastic, and then it was a wet
14:18:34 12 dry bag that's the kind of bag you use for floating down a
14:18:37 13 river or something like that and putting your things in.

14:18:40 14 On the outside of that bag was the
14:18:42 15 defendant's name and his telephone number and inside that
14:18:45 16 was a bunch of black clothing and a cell phone and couple
14:18:48 17 of black hats and some running type slash hiking shoes.

14:18:56 18 We could not have discovered that any
14:18:58 19 sooner, Judge, and we disclosed it as quickly as possible
14:19:02 20 after it was discovered, and it certainly is probative
14:19:06 21 evidence in this case of the defendant's plans to flee.

14:19:09 22 It was discovered in connection with the
14:19:12 23 previous statements by Ms. Renee Girard that she went out
14:19:17 24 to that bag with the defendant and he put that bag out
14:19:20 25 there shortly after the homicide involving Carol Kennedy.

14:19:26 1 Secreted the bag out there and then re-visited it a month
14:19:31 2 or so later.

14:19:33 3 THE COURT: Can she, Ms. Girard, if she is
14:19:36 4 testifying, tighten the dates down any more than shortly
14:19:40 5 after? Whatever that means?

14:19:41 6 MR. BUTNER: She can testify that they went out
14:19:44 7 there and put that bag there, my recollection is, and I
14:19:48 8 don't have it in front of me, was about -- within two
14:19:51 9 weeks after the homicide and then re-visited that bag
14:19:56 10 about a month-and-a-half or so later. And then she went
14:20:00 11 back trying to look for it while the defendant was
14:20:03 12 incarcerated and was unable to find the bag. Right. In
14:20:11 13 June and July -- all of these events occurring in June and
14:20:15 14 July of 2008 and then, of course, we went back much later
14:20:20 15 and found the bag. So that is when that occurred.

14:20:23 16 In terms of the High Desert Golf receipts,
14:20:28 17 those just didn't get disclosed, Judge. The witness was
14:20:33 18 identified and basically they are, in a sense, negative
14:20:37 19 evidence. And by that, I mean they are evidence of
14:20:41 20 receipts for golf clubs that were purchased, and
14:20:50 21 demonstrate that Mr. Democker and Mr. Knapp didn't
14:20:54 22 purchase a golf club from High Desert Golf Receipts and
14:20:58 23 didn't exchange one with High Desert Golf Receipts. The
14:21:02 24 golf club being the Big Bertha three seven wood type of
14:21:12 25 club.

14:21:12 1 The State ultimately did purchase one from
14:21:15 2 High Desert Golf, though, a left-handed one.

14:21:18 3 So that's the nature of this request, your
14:21:21 4 Honor, and I would hope that the Court would grant the
14:21:25 5 motion.

14:21:26 6 THE COURT: Mr. Sears.

14:21:31 7 MR. SEARS: Your Honor, in general terms, we have
14:21:34 8 no objection to this late disclosure.

14:21:37 9 Taking up the question of this bag, there is
14:21:40 10 a -- an explanation that goes along with that that will
14:21:44 11 come out and we think that it's simply just part of this
14:21:47 12 period in mid-August of 2008 that you have heard about
14:21:51 13 where Mr. Democker was fearful that he was going to be
14:21:55 14 wrongfully arrested. He just had the date wrong by a
14:21:59 15 couple of months, and that this was just part of that and
14:22:02 16 there's an explanation for where it was and what was
14:22:05 17 involved in it.

14:22:06 18 We think we have seen some testing and we
14:22:08 19 know that they sent the lab the bag, I believe to
14:22:11 20 Sorenson, for testing and we are not putting our hands on
14:22:14 21 the results, but our recollection is that it shows
14:22:17 22 predictably Mr. Democker's biological evidence is on his
14:22:21 23 own property. So that is not surprising.

14:22:23 24 The golf club thing has sort of an
14:22:26 25 interesting background. What happened -- it occurred to

14:22:29 1 us some time ago that it was passingly strange that the
14:22:33 2 Yavapai County Sheriff's office could go to a golf shop in
14:22:36 3 town just a few days after the murder, walk in and say you
14:22:40 4 wouldn't have such a thing as a left-handed Callaway Big
14:22:44 5 Bertha steelhead three number seven fairway wood, would
14:22:46 6 you, and go over to the used club bin and say like this
14:22:49 7 one? And so that's the one the Sheriff's office has.
14:22:53 8 They actually found the club that they claim -- that they
14:22:57 9 have always claimed is the murder weapon. They found a
14:22:59 10 club identical to it with all those unusual
14:23:01 11 characteristics in a used club bin in Prescott, Arizona.

14:23:06 12 And so we undertook an investigation through
14:23:09 13 the manufacturer, through High Desert Golf Shop, through
14:23:12 14 the place where Mr. Democker purchased the original club,
14:23:15 15 and concluded after running this to the ground, that it
14:23:18 16 was just an amazing coincidence. That those clubs had
14:23:20 17 serial numbers and their birth date and place of origin
14:23:25 18 could be identified and, in fact, that club was not the
14:23:28 19 club that Mr. Democker bought. So that wasn't an
20 identifier.

14:23:32 21 I think the State, and the police, probably
14:23:34 22 assumed that we were looking at this for something else.
14:23:38 23 That we were trying to say that Mr. Knapp had handled the
14:23:42 24 club or returned the club or something else.

14:23:44 25 That is all we were doing. If they had

14:23:45 1 asked us, we would have told them that. That we were just
14:23:48 2 trying to see if we could answer what appeared to be just
14:23:52 3 an astonishing coincidence, and there are only a few
14:23:55 4 thousand of these clubs who were ever produced and are in
14:23:57 5 circulation and here's one and it's the first place that
14:23:59 6 the first officer went to, and they say, yeah, we have one
14:24:02 7 right over there. So that is what that is about.

14:24:03 8 So -- so we think this late disclosed
14:24:07 9 receipt is interesting, but has no value and to the extent
14:24:11 10 that the State wants to use it, that's fine. It's just
14:24:15 11 nothing that is of any interest to us.

14:24:17 12 THE COURT: I'll grant the request then.

14:24:20 13 MR. BUTNER: Thank you, Judge.

14:24:20 14 THE COURT: And authorize the State to use this
14:24:24 15 late disclosed evidence.

14:24:28 16 MR. SEARS: I'm sorry, your Honor.

14:24:29 17 THE COURT: I will grant the request if there is
14:24:32 18 no opposition.

14:24:32 19 MR. SEARS: There is not, your Honor.

14:24:47 20 Your Honor, I have the visitation motion,
14:24:49 21 and I will you give a copy. This is the one you wanted
14:24:52 22 the response.

14:24:53 23 THE COURT: The original is being filed?

14:24:54 24 MR. SEARS: Is about to be filed, your Honor.
14:24:56 25 That is a job left to me for some reason.

14:24:59 1 THE COURT: All right.

14:25:00 2 MR. SEARS: The pressure is on.

14:25:04 3 THE COURT: All right. Now, anything else that
14:25:08 4 is still pending that you think we need to have rulings on
14:25:11 5 before the potential of opening statements? I think
14:25:14 6 otherwise the urgency is to get the preliminary
14:25:19 7 instructions to some extent settled.

14:25:23 8 MR. SEARS: Your Honor, we heard you say this
14:25:26 9 morning that you would welcome information from us and the
14:25:32 10 State about how to handle the admonishing of the voir dire
14:25:39 11 of the jurors on this publicity issue and we will turn to
14:25:43 12 that over the weekend with --

14:25:44 13 THE COURT: Thank you.

14:25:45 14 MR. SEARS: -- all the other things we have to
14:25:47 15 do. That is something we want to be involved in.

14:25:49 16 THE COURT: I understand and I would appreciate
14:25:50 17 that and the thoughts that either side may have, whether
14:25:54 18 you put it in the formality of a motion or otherwise. I
14:26:02 19 am willing to consider whatever you may have to offer in
14:26:07 20 terms of thoughts about how to proceed.

14:26:13 21 MR. SEARS: There is one other minor matter.

14:26:16 22 THE COURT: Okay.

14:26:16 23 MR. SEARS: Your Honor, in view of the
14:26:18 24 transformation of this case to a noncapital case, you had
14:26:21 25 previously entered some very detailed orders about the

14:26:25 1 rule excluding witnesses and principally as it affects our
14:26:28 2 client's family and others, the rule --

14:26:31 3 THE COURT: Which was notable in your proposed
14:26:33 4 preliminary jury instructions, I guess.

14:26:36 5 MR. SEARS: Your Honor, our understanding would
14:26:38 6 be now that there will not be a second or third trial,
14:26:43 7 that there would be no exclusion of witnesses who were
14:26:47 8 previously only identified as mitigation witnesses by the
14:26:51 9 defense and to the extent they would be trial witnesses in
14:26:55 10 the ordinary course, if they were through testifying and
14:26:58 11 released, they could remain in the courtroom.

14:27:00 12 As it turns out, at present none of our
14:27:02 13 mitigation witnesses that would be affected by this that
14:27:05 14 would be interested in being present for the trial are
14:27:08 15 also trial witnesses, so I just -- so that -- many of them
14:27:13 16 are here now. We just thought we could clarify that for
14:27:16 17 them.

14:27:16 18 THE COURT: Any issue with regards to that if we
14:27:18 19 are not doing a death penalty, mitigation slash penalty
14:27:22 20 phase?

14:27:24 21 MR. BUTNER: Right. I don't think -- I think
14:27:25 22 that's a nonissue now, so to speak. I think that is the
14:27:28 23 way Mr. Sears described it. If they are not trial
14:27:31 24 witnesses, they are not excluded.

14:27:34 25 THE COURT: And if they are in the courtroom,

14:27:38 1 then they won't be allowed to be trial witnesses is the
14:27:43 2 general understanding that you all would have, then.

14:27:44 3 MR. SEARS: Yes, your Honor.

14:27:46 4 THE COURT: Then I would clarify for the record
14:27:48 5 that anyone who was disclosed solely for purposes of
14:27:51 6 mitigation or the penalty phase or solely for the
14:27:56 7 aggravating phase, anything other than the guilt or
14:27:59 8 innocence phase, those witnesses are not covered by the
14:28:03 9 rule excluding witnesses. They may be in the courtroom.

14:28:06 10 MR. SEARS: Thank you, then.

14:28:07 11 MR. BUTNER: While we're discussing the rule
14:28:09 12 excluding witnesses, we had discussed the possibility of
14:28:11 13 some deviations from the rule excluding witnesses for
14:28:15 14 expert witnesses or some of them.

14:28:19 15 I don't think -- we don't want to do that,
14:28:22 16 Judge. We think it would be best that all witnesses be
14:28:24 17 excluded during the course of this trial, whether they are
14:28:27 18 experts or lay witnesses or whatever kind of witnesses you
14:28:34 19 would characterize them. We think it would appropriate
14:28:35 20 that they be excluded.

14:28:38 21 MR. SEARS: Your Honor, you had entered a very
14:28:39 22 specific order on this matter and I remember that it was
14:28:46 23 ordered that DNA experts for either side could be present
14:28:50 24 for the testimony of their counterparts on the other side.
14:28:54 25 I do not recall, but we will look to see whether that was

14:28:57 1 extended to experts -- financial experts or computer
14:29:00 2 experts. My recollection is that it might have been for
14:29:04 3 computer experts, but I would trust the written minute
14:29:09 4 entries of the Court on this, but I do remember clearly
14:29:12 5 that you had carved out an exception for DNA experts.

14:29:15 6 MR. BUTNER: I stand corrected, Judge. That's
14:29:17 7 right. With the exception of DNA experts, we were still
14:29:20 8 talking about computer experts and whether that was going
14:29:22 9 to be considered.

14:29:24 10 The State is opposed to that, but, in terms
14:29:27 11 of DNA experts, I forgot and we did agree to that and I
14:29:33 12 have no objection to that.

14:29:34 13 THE COURT: What's your posture? Do you care if
14:29:37 14 the current order is left in place, Mr. Sears, that allows
14:29:40 15 the DNA experts to be in during each other's testimony,
14:29:44 16 but not the other experts?

14:29:46 17 MR. SEARS: Yeah. We had proposed that, so we
14:29:48 18 stand by that. But I want to take a look at the minute
14:29:51 19 entry on that point to see if it's broader than that, and
14:29:53 20 if it's broader than that, I would ask the Court to
14:29:56 21 continue in effect the broader order.

14:29:58 22 THE COURT: I'll cast my lot with the orders that
14:30:04 23 were previously entered. If you want to change those
14:30:07 24 orders, I will consider it.

14:30:09 25 MR. SEARS: Your Honor, your position is that it

14:30:12 1 would make good sense, and there is really no
14:30:14 2 countervailing solid argument that I can think of, to have
14:30:17 3 all experts present during this and making exceptions for
14:30:22 4 one discipline or another is simply making an exception
14:30:25 5 for the one discipline. I don't see the harm that
14:30:28 6 Mr. Butner sees it having experts present in court to do
14:30:32 7 that.

14:30:33 8 I remember in pretrial hearings learning
14:30:36 9 only after the fact that our friend, Mr. Echols, was in
14:30:39 10 court. There wasn't any rule excluding witnesses, but
14:30:41 11 surely Mr. Echols gained something -- I would think the
14:30:44 12 State would think he gained something by watching
14:30:46 13 Mr. Curry testify and if this is the search for truth that
14:30:50 14 Mr. Butner points us to, there are lots of ways to get to
14:30:55 15 the truth. One of them is having people be fully
14:30:57 16 informed.

14:30:58 17 THE COURT: Well -- and that's part of why the
14:31:00 18 rule is in place though is to get the witness' own
14:31:04 19 testimony. I will leave intact my current order.

14:31:07 20 MR. BUTNER: Thank you.

14:31:09 21 MR. SEARS: Whatever it may be.

14:31:10 22 THE COURT: My recollection of it is the same as
14:31:14 23 what you all believe. That there was an exception for the
14:31:23 24 DNA witnesses, but not for the other experts.

14:31:25 25 The other experts were covered by it. If

14:31:31 1 that's not the case, I'll have you look it up and let me
14:31:35 2 know. But otherwise I will assume that you will keep your
14:31:40 3 experts out of the courtroom unless they are testifying
14:31:42 4 until after they have testified and are excused.

14:31:46 5 Okay. Any other motions that you think are
14:31:55 6 still sitting on the table?

14:31:58 7 MR. SEARS: Your Honor, I think we have run down
14:32:00 8 the list now.

14:32:03 9 MR. BUTNER: The one remaining motion, Judge,
14:32:05 10 that I think you noted that, we are going to, I guess, do
14:32:08 11 that what we come back sometime on Wednesday is the e-mail
14:32:11 12 motion.

14:32:11 13 THE COURT: Right.

14:32:12 14 MR. BUTNER: Okay.

14:32:14 15 THE COURT: Gave the other side a chance to
14:32:19 16 respond.

14:32:19 17 MR. BUTNER: Certainly.

14:32:20 18 THE COURT: All right. Preliminary jury
14:32:22 19 instructions.

14:32:24 20 Generally the defense provided some
14:32:31 21 preliminary jury instructions that Robin typed up and the
14:32:37 22 Court provided, I believe, at least an electronic
14:32:44 23 transmission of what Robin put together from the Court's
14:32:52 24 normal instructions with some substitutions that were
14:32:56 25 proposed by the defense. Just because they were sent out

14:33:00 1 doesn't mean I am wedded to those and I want to make sure
14:33:03 2 everybody knows that, but I sent them out because it's
14:33:06 3 easier to delete things than to put things in, and I have
14:33:13 4 reviewed those.

14:33:18 5 A number of the proposed preliminary
14:33:22 6 instructions that the defense provided are amended and not
14:33:29 7 the traditional RAJI type instructions, and I think that
14:33:36 8 those are reflected in the -- what Robin typed up as --
14:33:43 9 she put parenthetically amended just to make that a little
14:33:51 10 clearer, but there are things like a preparatory
14:33:56 11 introductory sort of phrase or a few sentences, a
14:34:04 12 paragraph that the defense had in their proposal, and I
14:34:14 13 guess I put together something more along the lines of
14:34:18 14 what the Court traditionally has been giving in terms of
14:34:22 15 preliminary jury instructions and I will provide a copy to
14:34:26 16 each side of that for comparison purposes.

14:34:31 17 MS. CHAPMAN: Your Honor, this is different from
14:34:32 18 what was electronically provided?

14:34:35 19 THE COURT: Yes.

14:34:35 20 MS. CHAPMAN: Okay. Just so the record is clear,
14:34:37 21 your Honor, the defense proposed -- all of the defense's
14:34:41 22 proposed instructions were amendments to the RAJI
14:34:43 23 instructions. There were no non-RAJI instructions except
14:34:46 24 for the burden of proof which was a merger of sorts of the
14:34:50 25 Ninth Circuit's proposed instruction on that issue as well

14:34:52 1 as the RAJI on that issue, on the presumption of innocence
14:34:55 2 and burden of proof. There were no non-RAJI proposed
14:34:58 3 instructions.

14:34:59 4 THE COURT: Yeah. That was my understanding.

14:35:01 5 MS. CHAPMAN: Okay.

14:35:02 6 THE COURT: Some of the language was drafted from
14:35:04 7 federal system cases.

14:35:09 8 But for discussion purposes so that there's
14:35:18 9 kind of a combination of the, you know, strict RAJIs that
14:35:22 10 the Court has used and to compare with a draft, I put
14:35:28 11 those together for you as well.

14:35:30 12 Mr. Butner, Mr. Papore filed something
14:35:40 13 specific with regards to the issue of some of the -- well,
14:35:50 14 particularly the proof beyond a reasonable doubt
14:35:54 15 instruction.

14:35:56 16 Also attached, the State had proposed in the
14:36:04 17 preliminary jury instructions filed May 4th the
14:36:13 18 standard -- a number of standard RAJIs and capital case
14:36:20 19 instructions. Obviously to the extent any of the
14:36:22 20 preliminary jury instructions are talking about penalty
14:36:30 21 aspects of things, those will have to be changed.

14:36:34 22 But how would you like to approach this with
14:36:40 23 the standards side-by-side with what the defense proposed?
14:36:49 24 Is that -- the unamended version compared to the other or
14:36:57 25 do you want to tell me why I ought to give an amended

14:37:02 1 version, for example, instead of a regular Portillo
14:37:06 2 instruction on the proof requirements?

14:37:10 3 MS. CHAPMAN: Your Honor, I can walk through what
14:37:12 4 the amendments were to the standard instruction if that
14:37:16 5 would be helpful.

14:37:16 6 THE COURT: I think that probably would be for
14:37:19 7 the other side as well as for the Court.

14:37:21 8 MS. CHAPMAN: Okay. As an initial matter, none
14:37:22 9 of the preliminary instructions deal at all with the
14:37:25 10 capital nature of the case or not, so I don't think any
14:37:29 11 amendments --

14:37:29 12 THE COURT: Nor did I see any other than having
14:37:32 13 now the is jury not to consider penalty.

14:37:35 14 MS. CHAPMAN: Sure. Right.

14:37:36 15 And I think you also included -- just so the
14:37:39 16 record is clear, your Honor had asked that preliminary
14:37:41 17 jury instructions be proposed by the parties on April
14:37:44 18 29th.

14:37:45 19 THE COURT: I did. I recognize that.

14:37:46 20 MS. CHAPMAN: We did and the State did not.

14:37:48 21 We also on May 11th then filed a motion or
14:37:51 22 brief for your Honor about the reason and the why for the
14:37:55 23 combination of the RAJI and the Ninth Circuit jury
14:37:57 24 instruction on the burden of proof and the presumption of
14:38:01 25 innocence.

14:38:01 1 Today for the first time the State speaks to
14:38:04 2 the preliminary jury instruction issues and specifically
14:38:09 3 objects to that, and we will get to that when we get
14:38:11 4 there, but I think the record should be clear about that.
14:38:13 5 The State's proposals were not any preliminary jury
14:38:16 6 instructions. They were post-trial or post-evidence
14:38:19 7 instructions to be given at the close of evidence, not
14:38:22 8 preliminary instructions. They didn't do that.

14:38:24 9 So I would like to start with that.

14:38:27 10 THE COURT: I recognize that's the state of
14:38:29 11 affairs.

14:38:30 12 MS. CHAPMAN: Okay. So the first -- we propose
14:38:33 13 these in an order that's slightly different from the way
14:38:36 14 that you or Robin had sent them to us, but I guess I will
14:38:39 15 just go through them in the order --

14:38:41 16 THE COURT: Okay.

14:38:41 17 MS. CHAPMAN: The first would be the preliminary
14:38:43 18 RAJI Number 8 which is the exclusion of witnesses. We had
14:38:46 19 amended it to include the language --

14:38:50 20 THE COURT: Before you get to that point.

14:38:52 21 MS. CHAPMAN: Sure.

14:38:53 22 THE COURT: You have the kind of introductory
14:39:00 23 first. Jury service --

14:39:03 24 MS. CHAPMAN: That's from the preliminary RAJI
14:39:05 25 one.

14:39:06 1 THE COURT: Do you really think that's necessary
14:39:08 2 for -- and if so, tell me why given how much time we have
14:39:13 3 already spent with the jury selection, if we -- if I rule
14:39:18 4 in favor and maintain that ruling of keeping the current
14:39:22 5 jury panel.

14:39:23 6 MS. CHAPMAN: Well, your Honor, I think
14:39:24 7 acknowledging the solemnity of the experience of jury and
14:39:27 8 our appreciation for what they are doing and the amount of
14:39:30 9 time it takes and the historical context, there is nothing
14:39:32 10 certainly improper about it. It won't take much time. I
14:39:35 11 think it's two sentences and -- it is three sentences. It
14:39:38 12 is from the preliminary RAJIs that are proposed. It's the
14:39:41 13 first one and I think it's an acknowledgement of the
14:39:44 14 context of jury service. It's an appreciation of sorts.

14:39:49 15 THE COURT: I suppose.

14:39:50 16 Your position on that, Mr. Butner?

14:39:54 17 MR. BUTNER: Well, Judge, we are still trying to
14:39:55 18 find the preliminary jury instructions.

14:39:58 19 THE COURT: Do you need --

14:40:00 20 MR. BUTNER: We have yours.

14:40:02 21 MS. CHAPMAN: These -- the ones that the judge
14:40:04 22 provided I think are largely the RAJIs.

14:40:07 23 MR. BUTNER: Pretty much the same, I understand,
14:40:08 24 but they are not exactly and we're trying to find it in
14:40:12 25 the computer and we are not able to do that.

14:40:14 1 THE COURT: Do you have someone that just wants
14:40:15 2 to burn a copy?

14:40:18 3 MR. BUTNER: That would be great.

14:40:27 4 THE COURT: I lost Phil and don't have Robin.

14:40:29 5 MR. BUTNER: Yes. Thank you.

14:40:31 6 THE COURT: I think those are all of them.

14:40:58 7 While we're doing that, I am advised by my
14:41:02 8 high level counselors that this might be a good time to
14:41:05 9 take a break.

14:41:06 10 MR. BUTNER: Thank you, Judge.

14:41:09 11 THE COURT: Take until five to 3:00.

14:41:13 12 (Recess.)

14:54:58 13 THE COURT: Record reflects the defendant is
14:55:04 14 present, all three of his counsel, both counsel for the
14:55:07 15 State.

14:55:10 16 MS. CHAPMAN: Your Honor, if I might, you had
14:55:14 17 provided us electronically with a version that is
14:55:17 18 different both in form and format from we have been
14:55:20 19 provided today. In just going through what we have been
14:55:23 20 provided today, there are some things that aren't from the
14:55:25 21 RAJIs and I don't think are consistent with what we would
14:55:27 22 be comfortable with, but we haven't had an opportunity to
14:55:30 23 review this carefully what you provided us today.

14:55:32 24 So what I would suggest is that we take this
14:55:35 25 up on Wednesday after we have all had a chance to look at

14:55:38 1 it if what you handed us this morning is what we should
14:55:41 2 consider. I just haven't had time to look through it.

14:55:44 3 THE COURT: No. I am happy to go through yours
14:55:46 4 and then compare, you know, or just tell me where the
14:55:50 5 differences are, and I will think about this and then work
14:55:54 6 on them over the weekend.

14:55:56 7 MS. CHAPMAN: Sure. We have the --

14:55:58 8 THE COURT: I am not going to finalize them today
14:56:00 9 by any means.

14:56:01 10 MS. CHAPMAN: I guess we have three documents we
14:56:04 11 are looking from, so I am a little confused about --

14:56:08 12 THE COURT: Well, don't work from the ones I just
14:56:09 13 gave you then.

14:56:10 14 MS. CHAPMAN: Okay.

14:56:11 15 MR. BUTNER: Oh.

14:56:12 16 THE COURT: Work from the ones that were
14:56:16 17 previously disclosed. Tell me what the issues are that
14:56:21 18 you -- where you think the changes are necessary or why
14:56:26 19 you're proposing them and I will hear the State's
14:56:29 20 objections with regards -- the biggest one I think they
14:56:33 21 have is Portillo.

14:56:36 22 MS. CHAPMAN: Sure.

14:56:37 23 Well, I guess I will go through them in the
14:56:39 24 order like we were and then -- but with the acknowledgment
14:56:43 25 that we haven't look at what we've been handed today other

14:56:45 1 than -- just because I want to make sure we don't forget
14:56:48 2 this -- the one that you handed us today, there is a 2(D)
14:56:56 3 about the defendant's right to testify or not -- decision
14:57:00 4 not to testify. That's I think inconsistent with the RAJI
14:57:02 5 and something we would be very uncomfortable with
14:57:05 6 providing.

14:57:06 7 MR. BUTNER: Where?

14:57:07 8 THE COURT: 2(D).

14:57:09 9 MR. BUTNER: Where are you now?

14:57:11 10 MS. CHAPMAN: I am --

14:57:12 11 THE COURT: On the new ones.

14:57:14 12 MR. BUTNER: On the Court's new ones or on --

14:57:17 13 MS. CHAPMAN: Yes. The Court's new ones from
14:57:20 14 today. 2(D).

14:57:21 15 MR. BUTNER: 2(B).

14:57:22 16 MS. CHAPMAN: D as in dog.

14:57:24 17 MR. BUTNER: I'm sorry. Thank you.

14:57:33 18 THE COURT: That's not the RAJI?

14:57:36 19 MS. CHAPMAN: It is not, your Honor.

14:57:37 20 Let me read you RAJI -- the preliminary RAJI
14:57:40 21 is 17 and it says a defendant in a criminal case has the
14:57:43 22 constitutional right not to testify at trial and the
14:57:47 23 exercise of that right cannot be considered by the jury in
14:57:49 24 determining whether a defendant is guilty or not guilty.

14:57:52 25 That's the preliminary RAJI 17 Third

14:57:55 1 Edition. That is as we offered it and as you provided it
14:57:58 2 in the instructions that were e-mailed.

14:58:03 3 THE COURT: Okay. Thank you.

14:58:04 4 MS. CHAPMAN: Okay. So going back to the
14:58:09 5 instructions that were e-mailed, the exclusion of
14:58:12 6 witnesses, which is the preliminary RAJI Number 8, we had
14:58:17 7 proposed amending it, because some of the witnesses in
14:58:22 8 this case are also victims and I think that although the
14:58:29 9 language was amended to include the fact that victims
14:58:32 10 would not be precluded and also Mr. Democker's parents, I
14:58:36 11 think in light of the State's decision to dismiss the
14:58:39 12 death penalty, we could take out the reference to
14:58:41 13 Mr. Democker's parents, but should still explain that the
14:58:44 14 exclusion of witnesses does not apply to victims.

14:58:48 15 And I think that if we just remove the term
14:58:50 16 "or to Mr. Democker's parents", the proposed instruction
14:58:55 17 that the defense provided on April 29thth and this the
14:58:58 18 Court included in the e-mailed preliminary jury
14:59:00 19 instructions would be appropriate.

14:59:03 20 THE COURT: All right.

14:59:06 21 MR. BUTNER: So if I understand you correctly,
14:59:09 22 you're just going to strike where it says "or to
14:59:12 23 Mr. Democker's parents"?

14:59:15 24 MS. CHAPMAN: I think that would be our proposal.

14:59:19 25 THE COURT: Any objection to that?

14:59:22 1 MR. BUTNER: And this is the standard RAJI, isn't
14:59:24 2 it?

14:59:25 3 MS. CHAPMAN: Yes. It is Standard Preliminary
14:59:28 4 RAJI 8 with the addition of the sentence -- well, we
14:59:31 5 changed "all" to "most" to say that it applies to most
14:59:35 6 witnesses. And then we add a sentence that the Court has
14:59:38 7 determined that some witnesses are not subject to this
14:59:40 8 rule and you should not concern yourself with who is and
14:59:43 9 is not included. This rule does not apply to the certain
14:59:46 10 designated family members of the victims in this case all
14:59:49 11 of whom are permitted to be present for any and all
14:59:52 12 proceedings even though they may be called as witnesses.

14:59:54 13 That's the addition or the amendment.

14:59:59 14 THE COURT: All right. I don't have a particular
15:00:03 15 issue with regard to that.

15:00:04 16 MR. BUTNER: I don't either. That's fine.

15:00:06 17 MS. CHAPMAN: Then proposed RAJI Number 9 is with
15:00:09 18 respect to bench conferences and recesses and we had just
15:00:12 19 added the sentence because of the nature of this courtroom
15:00:15 20 and what we have experienced during some of the
15:00:18 21 preliminary voir dire is that to add the sentence that if
15:00:21 22 you overhear what is taking place at the bench conference,
15:00:23 23 to please advise the Court immediately.

15:00:29 24 MR. BUTNER: Where is that?

15:00:32 25 THE COURT: Second to last sentence on page 4(J).

15:00:37 1 MR. SEARS: By singing in unison we can hear you.
15:00:42 2 That would be the way to do it.
15:00:45 3 MR. BUTNER: Did you have a little --
15:00:46 4 THE COURT: I may have --
15:00:47 5 MR. BUTNER: -- nip at the break.
15:00:49 6 THE COURT: If you don't object, I may have court
15:00:53 7 or court staff.
15:00:54 8 MS. CHAPMAN: Sure. Thank you.
15:00:56 9 MR. BUTNER: Okay. No objection to that. I
15:01:00 10 object to the singing though.
15:01:02 11 MS. CHAPMAN: I do, too, for the record.
15:01:04 12 THE COURT: For the record, there is a
15:01:06 13 concurrence on that.
15:01:07 14 MS. CHAPMAN: Okay. And no transcript at all and
15:01:10 15 jury taking notes, which is the preliminary RAJI 12, we
15:01:13 16 simply amended the language --
15:01:18 17 MR. BUTNER: Would you go slower for us slow guys
15:01:22 18 over here.
15:01:22 19 MS. CHAPMAN: Okay.
15:01:25 20 MR. PAPORE: Page and paragraph would be helpful.
15:01:27 21 MS. CHAPMAN: Well, it would.
15:01:50 22 Okay. Here it is. Page six of the draft
15:01:55 23 instructions that the Court e-mailed.
15:01:57 24 THE COURT: Top of the page?
15:01:58 25 MS. CHAPMAN: Yes.

15:01:58 1 THE COURT: Okay.

15:02:00 2 MS. CHAPMAN: Actually it starts at the bottom of
15:02:03 3 page four.

15:02:04 4 THE COURT: Right.

15:02:04 5 MS. CHAPMAN: Excuse me. At the bottom of page
15:02:06 6 five.

15:02:07 7 THE COURT: Five. Right.

15:02:09 8 MS. CHAPMAN: The paragraph that begins you have
15:02:10 9 been provided with notes -- notepads and pens, which is at
15:02:13 10 the top of page six, at the bottom of that paragraph the
15:02:18 11 RAJI says your memory -- says you should not be overly
15:02:23 12 influenced by the notes, and what we have amended it to
15:02:27 13 say is your memory should not be influenced by the notes
15:02:29 14 of other jurors.

15:02:32 15 MR. BUTNER: I don't think that is a good idea.

15:02:34 16 THE COURT: Why are you offering that change?

15:02:37 17 MS. CHAPMAN: Because the RAJI refers to overly
15:02:40 18 influenced, and I think the law is properly that the
15:02:44 19 jurors should rely on their memory and not the notes of
15:02:47 20 anyone, particularly not the notes of other jurors, and so
15:02:50 21 the way that the RAJI writes is that they could be
15:02:53 22 somewhat influenced by the notes of other jurors and I
15:02:55 23 don't think that's in compliance with what the law
15:02:58 24 actually is.

15:03:02 25 THE COURT: Do you have a case to offer with

15:03:05 1 regard to that?

15:03:06 2 MS. CHAPMAN: That jurors shouldn't be influenced
15:03:08 3 by the notes of other jurors?

15:03:09 4 THE COURT: Uh-huh.

15:03:10 5 MS. CHAPMAN: I will provide one. I don't have
15:03:11 6 it off the top of my head.

15:03:17 7 The admonition --

15:03:20 8 MR. BUTNER: The RAJI says clearly your memory
15:03:22 9 should not be influenced by the notes of other jurors.

15:03:25 10 MS. CHAPMAN: It says --

15:03:27 11 MR. BUTNER: No. It doesn't say overly.

15:03:30 12 MS. CHAPMAN: That's what I have as the third
15:03:32 13 edition.

15:03:33 14 MR. BUTNER: Well, we might not be on that.

15:03:35 15 MR. PAPORE: That is hers.

15:03:36 16 MR. BUTNER: The one you gave us that we're
15:03:39 17 looking at says RAJI third, as amended, quote, your memory
15:03:45 18 should not be influenced by --

15:03:48 19 MS. CHAPMAN: That's as amended by me. What you
15:03:50 20 are looking as amended by me. RAJI third as amended.

15:03:54 21 MR. BUTNER: By Anne Chapman. It doesn't say
15:03:57 22 that though.

15:03:58 23 MR. SEARS: It says last viewed right on there.

15:04:02 24 THE COURT: It probably does somewhere.

15:04:04 25 MS. CHAPMAN: I can find the RAJIs. I can tell

15:04:07 1 you. So not be overly influenced. The part that is
15:04:28 2 struck out is what the RAJI says.

15:04:30 3 MR. BUTNER: I see.

15:04:31 4 MS. CHAPMAN: And the part that is underlined in
15:04:33 5 blue where it says -- I'm sorry -- the part that is
15:04:37 6 underlined. "Your memory should not be" is the amendment
15:04:41 7 that we proposed.

15:04:49 8 What the RAJI says is whether you take notes
15:04:51 9 or not, you should rely upon your own memory of what was
15:04:54 10 said and not be overly influenced by the notes of other
15:04:57 11 jurors.

15:04:58 12 The proposed amendment is whether you take
15:05:01 13 notes or not, you should rely on your own memory of what
15:05:03 14 was said. Period. Your memory should not be influenced
15:05:06 15 by the notes of other jurors.

15:05:13 16 MR. BUTNER: I think the RAJI is the better way
15:05:23 17 to go, Judge.

15:05:25 18 MS. CHAPMAN: I think the question is whether a
15:05:27 19 juror is to be influenced at all by the notes -- a juror's
15:05:30 20 memory is to be influenced at all by the notes of other
15:05:33 21 jurors, and I don't believe that the law is that it should
15:05:37 22 be. I think it's that it shouldn't be and that is why we
15:05:41 23 propose the amendment. That would be to rely on
15:05:46 24 extraneous information as opposed to their memory of what
15:05:48 25 was presented.

15:06:10 1 MR. BUTNER: I don't --

15:06:11 2 THE COURT: We don't put jurors in an isolation
15:06:15 3 box where the only thing they consider is their own
15:06:18 4 memory.

15:06:19 5 MS. CHAPMAN: Your Honor, I think that's right,
15:06:20 6 but I mean what does it mean to be overly influenced? I
15:06:23 7 think it's confusing and I don't think that jurors are to
15:06:26 8 rely on -- they are not even to rely on their own notes,
15:06:29 9 but they are to rely on their own memories over what their
15:06:32 10 notes say, let alone their memory versus what another
15:06:34 11 juror's notes are.

15:06:36 12 THE COURT: That is why we -- there's -- if we
15:06:40 13 put them each in an isolation booth and they vote on it
15:06:43 14 without ever having any discussion, that isn't what is
15:06:46 15 intended either.

15:06:47 16 MS. CHAPMAN: I don't think telling them not to
15:06:48 17 rely on other juror's notes is telling them not to discuss
15:06:51 18 the matter or discuss what their memory is, but simply not
15:06:54 19 to look at their notes of what other juror notes are over
15:06:57 20 their own memory and that's --

15:06:59 21 THE COURT: No.

15:07:00 22 MS. CHAPMAN: I think the RAJIs suggests you can
15:07:02 23 be influenced by the notes of other jurors over your own
15:07:04 24 memory and I think --

15:07:05 25 THE COURT: I am going to nominate you for the

15:07:06 1 next RAJI meeting.

15:07:09 2 MS. CHAPMAN: Please no.

15:07:10 3 THE COURT: My feeling exactly for myself.

15:07:15 4 MR. BUTNER: Judge, I think what the RAJI means
15:07:17 5 is that -- it clearly states, first of all, you should
15:07:21 6 rely upon your own memory. Okay. And then it says you
15:07:25 7 should not be overly influenced by the notes of other
15:07:27 8 jurors, meaning that if some other juror uses their notes
15:07:31 9 to refresh their recollection as to what was said, you
15:07:36 10 still should not be overly influenced by their notes. You
15:07:41 11 know, just use your own memory.

15:07:42 12 THE COURT: Or their memory, but it's still
15:07:44 13 something --

15:07:44 14 MR. BUTNER: They can rely.

15:07:45 15 THE COURT: -- still something that is subject to
15:07:47 16 discussion.

15:07:48 17 MR. BUTNER: Exactly.

15:07:48 18 THE COURT: In an attempt to reach a consensus on
15:07:53 19 what the evidence does or doesn't show.

15:07:55 20 MS. CHAPMAN: I think the proposed amendment does
15:07:56 21 that. I think it is confusing to say rely on your own
15:07:58 22 memory, but you can be kind of influenced by someone
15:08:01 23 else's notes. That confuses me.

15:08:04 24 THE COURT: Okay. Well, let me think about that,
15:08:07 25 and if you can find the source of your point, I would be

15:08:14 1 happy to take a look at any authority either side may have
15:08:17 2 with regard to that.

15:08:20 3 MR. BUTNER: One thing I could agree to, Judge, I
15:08:22 4 think you could strike that whole sentence about your
15:08:24 5 memory should not be overly influenced by the notes of
15:08:27 6 other jurors, because I think it can go the other way.
15:08:30 7 Isn't a good way to go and, you know, if we just
15:08:33 8 eliminated that, then it simply states, which we all, I
15:08:37 9 think, agree is the law that you should rely upon your own
15:08:39 10 memory of what was said.

15:08:43 11 THE COURT: Okay.

15:08:44 12 MS. CHAPMAN: I think that would be okay.

15:08:46 13 THE COURT: Well, let's finalize that next week
15:08:53 14 after you want to get me anything that you want to, but I
15:08:58 15 am open to striking the whole sentence.

15:09:00 16 MS. CHAPMAN: Okay.

15:09:01 17 THE COURT: If both sides want to agree to that.

15:09:03 18 MS. CHAPMAN: Thank you, your Honor.

15:09:04 19 Now, with respect to the proposed admonition
15:09:07 20 which begins on page ten of the preliminary instructions
15:09:12 21 that your Honor e-mailed, the paragraph that begins on
15:09:20 22 page ten that starts with each of you has gained knowledge
15:09:23 23 and goes to page eleven. We have simply added the part of
15:09:32 24 the preliminary instructions that you gave in the video
15:09:35 25 about prohibition about using e-mail, Facebook, My Space

15:09:39 1 and Twitter. That hasn't made its way into the proposed
15:09:41 2 preliminary RAJI Number 13. So we have added that
15:09:46 3 consistent with the Court's ruling or instructions to
15:09:48 4 jurors.

15:09:56 5 MR. SEARS: Got to add in iPod Touch.

15:10:01 6 THE COURT: Okay, Mr. Apple.

15:10:06 7 So Mr. Sears is proposing I add iPod.

15:10:10 8 MR. SEARS: Ms. Chapman corrects me. I stand
15:10:12 9 corrected on this. I think it stays as is, your Honor,
15:10:15 10 but I am not overly sensitive.

15:10:20 11 MR. BUTNER: So am I understanding that we are
15:10:22 12 talking about all of the stuff -- about this prohibition
15:10:27 13 about not discussing and so on starting up near the top of
15:10:32 14 page eleven talking about Facebook, My Space, Twitter,
15:10:36 15 etcetera.

15:10:36 16 MS. CHAPMAN: Yes.

15:10:37 17 MR. BUTNER: We don't have an objection that be
15:10:39 18 left in and given to the jurors, Judge. I think we need
15:10:45 19 to caution them about that in this case especially.

15:10:48 20 THE COURT: I have gotten more verbose in my
15:10:52 21 admonition already and given the nature of the age, maybe
15:10:58 22 that's necessary generally.

15:11:02 23 MS. CHAPMAN: Okay. With respect to the charged
15:11:05 24 offense, I don't actually think there are any amendments
15:11:07 25 to that. It's just putting the blush on what the charges

15:11:10 1 are and what the elements are. That's at the bottom of
15:11:14 2 page seven and going through page eight.

15:11:21 3 Your Honor, that does bring us though at the
15:11:23 4 bottom of page eight, you have included definitions which
15:11:26 5 are not part of the preliminary RAJIs and I think may have
15:11:30 6 been proposed by the State.

15:11:32 7 Generally --

15:11:32 8 THE COURT: Actually they are proposed by the
15:11:34 9 Court. I usually will give the mental state definitions
15:11:41 10 for the applicable mental states as part of the
15:11:45 11 preliminaries, but I generally will not give lesser
15:11:48 12 included.

15:11:49 13 MS. CHAPMAN: Okay. One issue that we have in
15:11:52 14 that regards is on page nine at "D" you have a definition
15:11:55 15 for recklessly, which we think --

15:11:58 16 THE COURT: Yeah. I had Robin just throw them
15:12:03 17 all in other than negligently, but I am not, as I say,
15:12:08 18 wedded to any of this if you don't see --

15:12:10 19 MS. CHAPMAN: We would like --

15:12:11 20 THE COURT: You don't see anything reckless and I
15:12:13 21 don't either --

15:12:14 22 MS. CHAPMAN: No.

15:12:15 23 THE COURT: -- in the case. That's what she put
15:12:17 24 in. I told her we can take things out easier than we can
15:12:21 25 put things in.

15:12:22 1 MS. CHAPMAN: Okay. We would propose to take out
15:12:24 2 "D" and also "N" which is the definition of adequate
15:12:27 3 provocation.

15:12:29 4 THE COURT: That also makes sense.

15:12:31 5 Mr. Butner, any objection to that?

15:12:33 6 MR. BUTNER: No. No objection, Judge.

15:12:35 7 THE COURT: Delete those.

15:12:40 8 MS. CHAPMAN: Okay. On the preliminary RAJI 23,
15:12:45 9 which begins on page 13 of the proposed preliminary
15:12:48 10 instructions e-mailed by the Court, on page 14 the
15:12:59 11 paragraph that begins with the word next -- everybody with
15:13:05 12 me?

15:13:05 13 MR. BUTNER: Not yet.

15:13:21 14 THE COURT: 14. Second paragraph, Mr. Butner.
15:13:29 15 Robin put amended right behind it.

15:13:32 16 MR. BUTNER: Right.

15:13:33 17 MS. CHAPMAN: So the RAJI reads after the State
15:13:37 18 finishes the presentation of its evidence, the defendant
15:13:39 19 may present evidence. We have added the phrase "but is
15:13:41 20 never required to do so," which is consistent with the
15:13:44 21 law, and we would propose that language be added.

15:13:48 22 THE COURT: Any objection to that?

15:13:50 23 MR. BUTNER: No. No objection.

15:13:53 24 THE COURT: So ordered then. I will keep that
15:13:55 25 in.

15:13:55 1 MS. CHAPMAN: Your Honor, we had proposed -- the
15:14:01 2 entire RAJI preliminary 23 has a third and fourth and
15:14:08 3 fifth paragraph that I think the Court has not included.

15:14:27 4 Actually here is what happened. It looks
15:14:28 5 like the Court put the preliminary RAJI about questions to
15:14:34 6 the Court in the middle of the proposed preliminary RAJI
15:14:38 7 23.

15:14:41 8 MR. BUTNER: Could you tell us where we're at?

15:14:43 9 MS. CHAPMAN: We are still in the same place on
15:14:45 10 page 14.

15:14:50 11 MR. BUTNER: And which paragraph?

15:14:52 12 MS. CHAPMAN: It's the paragraph that begins if
15:14:54 13 you have a question.

15:14:56 14 MR. BUTNER: Okay. About the case flow, a
15:15:00 15 witness, or for me?

15:15:03 16 MS. CHAPMAN: Yes. Just a moment here.

15:15:22 17 So that is actually RAJI preliminary 15 in
15:15:25 18 the middle of RAJI preliminary 23, and I think we proposed
15:15:34 19 it as it is proposed by the committee and I don't think
15:15:38 20 there was any amendment here. I don't think there is any
15:15:43 21 problem with that.

15:15:45 22 THE COURT: In terms of location within the
15:15:47 23 instructions?

15:15:48 24 MS. CHAPMAN: Right.

15:15:57 25 MR. BUTNER: What is the part that is stuck in

15:16:00 1 there? Where is that now?

15:16:02 2 MS. CHAPMAN: That whole paragraph if you have a
15:16:04 3 question that ends that entire paragraph on page 14.

15:16:08 4 MR. BUTNER: Right.

15:16:08 5 MS. CHAPMAN: Is just RAJI preliminary RAJI 15
15:16:11 6 inserted into the middle of the preliminary RAJI 23.

15:16:15 7 MR. BUTNER: Oh, I see. I see now.

15:16:19 8 MS. CHAPMAN: Okay. Then I think that the
15:16:21 9 reference to an amendment on page 15 with the paragraph
15:16:25 10 that starts at the end of page 14, "then the attorneys
15:16:27 11 will make closing arguments," simply that I think there
15:16:33 12 are two proposed paragraph fours in the proposed
15:16:38 13 preliminary RAJI 23 and I think we had just recommended
15:16:43 14 one of them as opposed to the other, and that's included
15:16:51 15 there and there is no other amendments to that preliminary
15:16:54 16 RAJI 23.

15:16:59 17 I think all the other proposed instructions
15:17:04 18 from your Honor's preliminary jury instructions that were
15:17:06 19 e-mailed are right out of the preliminary RAJI proposals
15:17:10 20 with no amendments other than the presumption of innocence
15:17:13 21 and burden of proof instruction which I think we could
15:17:16 22 take up now.

15:17:18 23 THE COURT: Any other additions that you think
15:17:22 24 are not in there, Mr. Butner, that need to be in there?

15:17:26 25 MR. BUTNER: I don't think so, Judge. These are

15:17:27 1 fine.

15:17:28 2 THE COURT: The only thing we need to discuss
15:17:30 3 then is the Portillo versus what is in the draft.

15:17:35 4 MR. BUTNER: Right.

15:17:45 5 MS. CHAPMAN: All right, your Honor. We had
15:17:46 6 filed a bench memorandum with respect to this proposed
15:17:49 7 instruction. There is an error in the memorandum and I
15:17:54 8 want to be clear about that.

15:17:55 9 The language from the proposed preliminary
15:17:59 10 RAJI 19, which is the presumption of proof and burden of
15:18:03 11 innocence is from the Portillo case. I think that the
15:18:06 12 motion suggests there was part of the language that wasn't
15:18:09 13 from Portillo, but, in fact, all is from Portillo.

15:18:13 14 What we have done is to propose a blending
15:18:17 15 of that preliminary RAJI 19 as well as the preliminary
15:18:21 16 jury instruction from the Ninth Circuit criminal jury
15:18:24 17 instruction 3.5.

15:18:26 18 Part of the reason for doing that, which I
15:18:28 19 think particularly significant now is the research that
15:18:33 20 suggests that jurors who are capitally qualified through
15:18:37 21 the voir dire process of capital qualification, according
15:18:42 22 to all of the undisputed social science research from the
15:18:44 23 capital jury project is that those jurors have a more
15:18:48 24 difficult time basically according the defendant the
15:18:53 25 presumption of innocence and requiring the State to meet

15:18:56 1 its burden of proof.

15:18:57 2 I think we saw evidence of this in detail
15:19:00 3 with our individual voir dire for people who flatly told
15:19:03 4 us that they would have concerns about Mr. Democker if he
15:19:07 5 determined that he wasn't going to testify. They also
15:19:10 6 said they would wonder and in other ways evidence their
15:19:15 7 lack of commitment, frankly, about the fundamental
15:19:17 8 principle about the presumption of innocence.

15:19:19 9 This proposed instruction that is taken in
15:19:22 10 part again from the preliminary RAJI 19 and in part from
15:19:26 11 3.5 of the Ninth Circuit proposed instruction, I believe
15:19:30 12 is more clear about what's required about the government's
15:19:34 13 burden of proof and the presumption of innocence, and I
15:19:37 14 detailed how it's been amended.

15:19:41 15 What we took out is the language that begins
15:19:44 16 "there are very few things in this world that we know with
15:19:47 17 absolute certainty" and instead what we put in was from
15:19:51 18 the 3.5 of the Ninth Circuit rules (sic) which says "it's
15:19:56 19 not required that the government" and actually it should
15:19:58 20 say State.

15:20:00 21 THE COURT: Right. I noted that already.

15:20:03 22 MS. CHAPMAN: It is not required that the State
15:20:04 23 prove guilt beyond all possible doubt. A reasonable doubt
15:20:07 24 is based upon reason and common sense and is not based
15:20:10 25 purely on speculation. It may arise from the careful,

15:20:14 1 impartial consideration of all of the evidence or from
15:20:16 2 lack of evidence. If, after a careful, impartial
15:20:20 3 consideration of all of the evidence, you are not
15:20:22 4 convinced beyond a reasonable doubt that the defendant is
15:20:24 5 guilty, it is your duty to find the defendant not guilty.
15:20:28 6 On the other hand, if after careful, impartial
15:20:30 7 consideration of all of the evidence, you are convinced
15:20:33 8 beyond a reasonable doubt that the defendant is guilty, it
15:20:35 9 is your duty to find the defendant guilty.

15:20:37 10 I think that's an accurate statement of the
15:20:39 11 law. I think it is less confusing than this citation from
15:20:46 12 Portillo which talks about things we know in the world
15:20:49 13 with absolute certainty.

15:20:50 14 THE COURT: The trouble is I think I am bound by
15:20:52 15 State versus Portillo.

15:20:53 16 MR. BUTNER: Yeah.

15:20:57 17 THE COURT: Arizona Supreme Court tells me I am
15:20:59 18 bound by State versus Portillo.

15:21:02 19 MS. CHAPMAN: And all I can say, your Honor, is
15:21:04 20 that in this capital context where I don't think the
15:21:06 21 question has been squarely considered, because we have a
15:21:10 22 capitally qualified jury and because we know that when we
15:21:13 23 capitally qualify a jury, they have different views than a
15:21:16 24 regular jury about the presumption of innocence and burden
15:21:18 25 of proof, that it would be appropriate to offer this

15:21:23 1 amended instruction on that basis.

15:21:26 2 I understand the Court's bound by Portillo,
15:21:30 3 but I do think in this circumstance we're talking about a
15:21:32 4 capitably qualified jury and you have undisputed
15:21:35 5 scientific evidence that a capitably qualified jury
15:21:37 6 understands language and terminology and basic principles
15:21:41 7 differently than a non-capitably qualified jury and
15:21:44 8 particularly here where we're now talking about trying a
15:21:47 9 noncapital case to a capitably qualified jury, that this
15:21:50 10 would be appropriate.

15:21:52 11 THE COURT: Mr. Butner.

15:21:53 12 MR. BUTNER: Judge, I think counsel -- they may
15:21:56 13 believe it's appropriate to offer it, but the Arizona
15:21:59 14 Supreme Court says it's not appropriate to give it.

15:22:01 15 They say this instruction -- and they refer
15:22:04 16 specifically to all of that language in Portillo -- is to
15:22:08 17 be given in every criminal case and I think that we're in
15:22:15 18 Arizona and we should not deviate from what the Arizona
15:22:18 19 Supreme Court has to say about that, and, of course,
15:22:22 20 invites error if we do.

15:22:26 21 THE COURT: Ms. Chapman.

15:22:28 22 MS. CHAPMAN: Your Honor, I won't say much more
15:22:30 23 about it other than I think in this specific capital
15:22:33 24 context, and Mr. Butner didn't respond to that, I think,
15:22:36 25 you know, trying a noncapital charge to a capitably

15:22:39 1 qualified jury probably invites error anyway. But if we
15:22:42 2 are going to do that, we ought to be particular about the
15:22:44 3 language that we use with respect to these very basic
15:22:47 4 principles, and that is what we propose.

15:22:49 5 It's not like we made this up on our own.
15:22:51 6 This has been approved by the Ninth Circuit. This is the
15:22:54 7 language that is offered in that instruction. I think
15:22:56 8 it's more clear and I think it addresses the social
15:22:58 9 science research that the State has not disputed and no
15:23:01 10 research has disputed about how juries view and understand
15:23:04 11 this information once they have been capitally qualified.

15:23:07 12 THE COURT: I am old enough so I am very
15:23:10 13 comfortable with the language that is used by the
15:23:12 14 instruction that you are proposing, having practiced long
15:23:18 15 enough to have used something pre-Portillo, but I think I
15:23:24 16 am bound by the Arizona Supreme Court's rulings with
15:23:28 17 regards to giving the Portillo instruction and not a
15:23:32 18 modified Portillo instruction, but invites the use of the
15:23:37 19 Ninth Circuit 3.5 aspects that you have included. So I am
15:23:44 20 going to go with what the Arizona Supreme Court tells me I
15:23:46 21 am supposed to go with.

15:23:48 22 MS. CHAPMAN: Your Honor, we don't --

15:23:50 23 THE COURT: I am not saying that it wouldn't be a
15:23:53 24 case that, because of the distinctions that you have
15:23:57 25 drawn, might not be appropriate to make a change, but I

15:24:04 1 think they will have to tell me that.

15:24:06 2 MS. CHAPMAN: Understood. I think with that,
15:24:08 3 your Honor, with respect to the preliminary instructions
15:24:11 4 that were e-mailed, not the ones that were handed to us --

15:24:13 5 THE COURT: Toss the ones that I gave you today.

15:24:15 6 MS. CHAPMAN: Okay. Then I think we would have
15:24:17 7 no other amendments or corrections and I will research the
15:24:22 8 issue of jurors consulting other juror's notes and I will
15:24:25 9 provide that to your Honor early next week.

15:24:27 10 THE COURT: As I told Robin, that's easy enough
15:24:30 11 to change on short notice, but I think I am satisfied with
15:24:37 12 the ones that you have -- the ones that I have to change
15:24:41 13 like Portillo.

15:24:43 14 MS. CHAPMAN: Just one moment, your Honor.

15:25:01 15 The other issue in light of the Court's
15:25:04 16 decisions yesterday, there is a preliminary RAJI with
15:25:07 17 respect to expert witnesses that we proposed in an
15:25:10 18 unamended form and I think that your Honor included in the
15:25:13 19 e-mailed instruction and I would propose that we be
15:25:16 20 permitted, as several courts have done, post-NAS, to
15:25:20 21 propose an alternative to that instruction in the
15:25:23 22 preliminaries and I haven't done that yet.

15:25:26 23 THE COURT: As long as I have the basics of what
15:25:28 24 we're dealing with pretty much flushed out, which I think
15:25:32 25 both sides have done here, please send whatever you're

15:25:38 1 sending. And it might be best, since Robin isn't here, to
15:25:46 2 fax what you are doing as well as electronically or having
15:25:51 3 John Sears bring in a hard copy of whatever it is that you
15:25:57 4 are proposing just so you make sure that I get it. With
15:26:00 5 Robin out, I am not sure I am going to have the
15:26:02 6 consistency I have when Robin is in.

15:26:04 7 MS. CHAPMAN: You have not changed to your
15:26:06 8 e-mail, your Honor.

15:26:06 9 THE COURT: Well, actually if you e-mail it to
15:26:10 10 me, then I will be sure to get it.

15:26:12 11 MS. CHAPMAN: Okay.

15:26:13 12 THE COURT: Do you have my e-mail as well as
15:26:15 13 Robin's? Both sides?

15:26:18 14 MS. CHAPMAN: Why don't you give it to us, so for
15:26:19 15 sure we'd have it.

15:26:19 16 MR. BUTNER: I am sure we have it.

15:26:22 17 THE COURT: It's TLindber, no G, all small -- no
15:26:30 18 caps at courts dot AZ dot US.

15:26:39 19 MS. CHAPMAN: Your Honor, we can go to you --

15:26:42 20 THE COURT: L-I-N-D-B-E-R.

21 MS. CHAPMAN: Okay.

15:26:45 22 THE COURT: They only have so many spaces
15:26:47 23 apparently.

15:26:50 24 THE REPORTER: It's GOV.

15:26:51 25 THE COURT: At dot GOV, not dot US. Dot GOV.

15:26:57 1 MS. CHAPMAN: At courts dot AZ dot GOV.

15:27:00 2 THE COURT: Let me verify that when I go back in

15:27:02 3 and make sure.

15:27:05 4 MR. HAMMOND: I think that is right, your Honor.

15:27:09 5 THE COURT: They changed it a time or two.

15:27:13 6 MR. HAMMOND: I think that is it.

15:27:14 7 THE COURT: I never send myself emails.

15:27:17 8 MR. HAMMOND: I think that's correct.

15:27:19 9 THE COURT: I think you're right.

15:27:20 10 MR. BUTNER: I take it counsel will send us that

15:27:23 11 proposed modified instruction by e-mail also?

15:27:25 12 MS. CHAPMAN: Absolutely.

15:27:26 13 MR. BUTNER: Thank you.

15:27:27 14 THE COURT: The usual practice as I understand

15:27:29 15 it.

15:27:30 16 MR. BUTNER: She's very good at it, Judge.

15:27:32 17 THE COURT: Yes, she is.

15:27:34 18 MR. BUTNER: A little too good, in fact, really.

15:27:35 19 THE COURT: I appreciate all the help, frankly,

15:27:38 20 you have given Robin in the exchanges for both sides when

15:27:40 21 you e-mail stuff in.

15:27:44 22 MR. PAPORE: Yes, your Honor. I just tested that

15:27:45 23 e-mail -- I just tested that e-mail and it bounced back.

15:27:47 24 THE COURT: Bounced back.

15:27:50 25 MR. PAPORE: T-L-I-N-B-E-R-S at CPS.

15:27:54 1 THE COURT: No. Courts. At courts.

15:28:00 2 C-O-U-R-T-S.

15:28:01 3 MR. PAPORE: I see.

15:28:08 4 THE COURT: Courts dot AZ dot GOV.

15:28:14 5 Thank you. If you want to double check and
15:28:28 6 verify that it was received.

15:28:32 7 MR. PAPORE: It went through this time, your
15:28:34 8 Honor. Mr. Hammond showed me the error of my ways.

15:28:38 9 THE COURT: If you want to call and make sure
15:28:40 10 that the judge knows to look on his computer to find what
15:28:44 11 we sent, feel free, but it might be easier than faxing it.

15:28:54 12 All right. What other issues do you think
15:28:57 13 you need to address at this point?

15:29:04 14 MR. SEARS: So that I understand --

15:29:06 15 MR. BUTNER: Anything further today? Anything
15:29:08 16 further today?

15:29:08 17 THE COURT: Today.

15:29:09 18 MR. SEARS: I could want to ask a little bit
15:29:11 19 about Wednesday.

15:29:12 20 MR. BUTNER: That is what I was going to ask
15:29:14 21 about, too.

15:29:15 22 THE COURT: I imagine. Margaret sent me an
15:29:19 23 e-mail that indicated that she had begun with the
15:29:25 24 preliminary job I set her to, which was bringing the jury
15:29:29 25 panel back at nine o'clock on Wednesday for additional

15:29:34 1 voir dire of all 40 and she had received confirmation as
15:29:41 2 of two, three hours ago of 26 of the 40. So she is still
15:29:48 3 working on getting verification from the rest they would
15:29:51 4 be here.

15:29:53 5 MR. SEARS: What do you see as the course of
15:29:56 6 events there from nine o'clock on Wednesday?

15:30:00 7 THE COURT: Additional voir dire that pertains to
15:30:02 8 the four questions that I asked, advising them about the
15:30:06 9 death penalty being off the table, that there would not be
15:30:09 10 two other phases of the trial, and whatever other
15:30:13 11 suggestions you may have with regard to explaining to them
15:30:18 12 and trying to ascertain whether any of them would be
15:30:22 13 unable to sit as a fair and impartial juror on the guilt
15:30:25 14 or innocence phase of the case as a result of all that.

15:30:29 15 MR. SEARS: Will we have an opportunity before
15:30:31 16 that begins --

15:30:32 17 THE COURT: Yes, please, at 8:15.

15:30:35 18 MR. SEARS: -- to talk about what the Court's
15:30:37 19 remarks would be and how voir would be conducted?

15:30:40 20 THE COURT: Get them to me, in writing or by
15:30:42 21 e-mail, your proposals and I will try to incorporate those
15:30:49 22 on Tuesday so that we can use them and implement them on
15:30:53 23 Wednesday, but I would like to have you all here by 8:15
15:30:56 24 so that we can have you here before the jury gets there to
15:31:01 25 discuss those.

15:31:02 1 MR. SEARS: Mr. Butner and I had begun a
15:31:05 2 discussion sometime ago, and we picked it up again today,
15:31:08 3 in which we thought it was a good idea for each side to
15:31:12 4 look at or at least be aware of whatever demonstrative
15:31:16 5 exhibits either side would use during opening statements
15:31:19 6 and I think we're moving towards that, and we have sent an
15:31:23 7 e-mail to them asking for their witness schedule so that
15:31:29 8 we can have the right materials and the right information
15:31:32 9 available, but the sooner we have the witness information,
15:31:35 10 the better off because that work is being done at least
15:31:40 11 initially in Phoenix and needs to be completed and brought
15:31:42 12 up here so we can work with it and be prepared to go
15:31:46 13 forward.

15:31:46 14 So if the State knows, for example, their
15:31:49 15 first three or four days of witnesses, that would be very
15:31:52 16 important for us.

15:31:53 17 THE COURT: I would like both sides to give an
15:31:57 18 indication to the other side who your witnesses are going
15:31:59 19 to be that are going to be called over at least the next
15:32:02 20 two to three days.

15:32:04 21 MR. SEARS: Our first witness will be Peter
15:32:06 22 Barnett. Could I say that.

15:32:12 23 MR. BUTNER: He doesn't let go, does he.

15:32:15 24 THE COURT: That is what I love about him.

15:32:20 25 MR. BUTNER: No comment if you can --

15:32:29 1 THE COURT: I would order and expect both sides
15:32:31 2 to -- I will grant that there can be emergencies and
15:32:38 3 unexpected unforeseen events that may require some
15:32:43 4 changing, but it sure makes the case flow a lot better for
15:32:48 5 both sides, if the other -- if both sides are advised of
15:32:51 6 who the next several days' witnesses are going to be, even
15:32:56 7 if you don't want to give a heads-up on precisely the
15:32:58 8 order you are calling them. I think -- I don't see
15:33:00 9 anything wrong with giving each other the precise order of
15:33:04 10 how you are going to be calling them.

15:33:06 11 MR. SEARS: Your Honor, in that respect, to the
15:33:08 12 extent that we use trial witness subpoenas, the work we
15:33:14 13 have done so far is I have had them all issued returnable
15:33:18 14 on June 2 on Wednesdays.

15:33:20 15 I would ask for an order today making them
15:33:23 16 all continuing subpoenas so that we don't have to re-issue
15:33:27 17 them, because in a trial like this, it would be virtually
15:33:30 18 impossible for us to accurately predict for people when
15:33:33 19 they would be called to testify. That the subpoena forms
15:33:36 20 we use always have contact information and request they
15:33:39 21 contact one or the other of the numbers in advance of
15:33:44 22 their testimony to be sure they will be there, but I would
15:33:46 23 ask for an order continuing the subpoenas.

15:33:48 24 MR. BUTNER: The State would ask for the same,
15:33:51 25 Judge. We have the same problem.

15:33:53 1 THE COURT: No doubt. I will order that the
15:33:55 2 subpoenas that have been issued are ongoing and continuing
15:34:01 3 subpoenas and to the extent that you need a formal order
15:34:06 4 for each side, if you would prep me a written order.

15:34:10 5 MR. SEARS: I think this is enough record, your
15:34:12 6 Honor -- thank you -- for our purposes.

15:34:15 7 THE COURT: If you would convey to your
15:34:17 8 respective witnesses the subpoena is ordered by the Court
15:34:21 9 to be an ongoing continuing subpoena until the point where
15:34:25 10 they have testified and been excused, that would be
15:34:28 11 appreciated.

15:34:29 12 MR. SEARS: Thank you, your Honor.

15:34:31 13 THE COURT: Okay.

15:34:33 14 MR. HAMMOND: Judge, this morning when Mr. Sears
15:34:35 15 asked for all of the transcripts of the voir dire, you
15:34:39 16 declined that request.

15:34:41 17 THE COURT: Expedited I think was the adjective
15:34:44 18 used as well.

15:34:44 19 MR. HAMMOND: Right. That was the one intended.
15:34:46 20 I'm sorry I left it out.

15:34:48 21 We do want at least this morning's
15:34:52 22 transcript and we would like the Court to approve our
15:34:58 23 request on an expedited basis.

15:35:03 24 THE COURT: What do you have available on your
15:35:05 25 schedule for being able to do an expedited of the morning?

15:35:15 1 And what is your meaning of expedited,
15:35:18 2 Mr. Hammond, so we are all on the same page.

15:35:20 3 MR. HAMMOND: I think we already have an
15:35:22 4 agreement with respect to that.

15:35:26 5 THE COURT: In terms of funding source, to the
15:35:29 6 extent it's coming out of the --

15:35:33 7 MR. HAMMOND: I have sent an e-mail.

15:35:36 8 THE COURT: Have you had any response from that?

15:35:38 9 MR. HAMMOND: I don't think so, but I think that
15:35:40 10 Mr. --

15:35:41 11 THE COURT: I will go ahead and approve the
15:35:43 12 expedited preparation of the transcript.

15:35:45 13 Is it with regard to any portion or you want
15:35:50 14 the whole morning?

15:35:51 15 MR. HAMMOND: We asked for the whole morning, but
15:35:53 16 what we really want is the entire transcript that related
15:35:58 17 to the question of the jury selection, your voir dire and
15:36:03 18 I think we figured out what it is. It is most of the --

15:36:07 19 THE COURT: Pertaining to the morning of 28 May
15:36:13 20 2010, and to the extent there are limitations agreed upon
15:36:19 21 between the Court Reporter and counsel, the Court would
15:36:25 22 approve that subject to any required approvals from other
15:36:32 23 agents of the government that may be necessary according
15:36:35 24 to local practice.

15:36:41 25 Anything else that you think I need to rule

15:36:42 1 on this afternoon?

15:36:43 2 MR. SEARS: I think we are caught up.

15:36:46 3 THE COURT: Mr. Butner, anything else that you
15:36:48 4 think I need to rule on this afternoon?

15:36:49 5 MR. BUTNER: Nothing further.

15:36:51 6 THE COURT: We'll resume at 8:15 on June 2nd,
15:36:55 7 Wednesdays June 2nd for court and counsel and defendant
15:36:59 8 and we have the jury coming in -- the jury panel that has
15:37:06 9 to date been selected of the 40 members planned for nine
15:37:11 10 o'clock, so we will have about 45 minutes to work with, so
15:37:13 11 let's be expeditious.

15:37:15 12 Have a good weekend.

15:37:17 13 MR. BUTNER: Thanks, Judge.

14 ---o0o---

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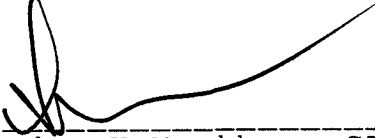
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2 C E R T I F I C A T E

3 I, SANDRA K MARKHAM, Certified Reporter, do
4 hereby certify that the foregoing pages constitute a true
5 and accurate transcript of the proceedings had and
6 testimony given in the hearing of the matter entitled as
7 upon the first page hereof.

8 Dated: July 16, 2010.

9 
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